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In 1977 the Ohio General Assembly rejected a proposed set of evidence rules based on the Federal Rules of Evidence. The Supreme Court of Ohio has resubmitted the rules for legislative consideration in 1978. The authors, as members of the Attorney General's staff, explain their objections to the proposed Rules, focusing on problems of draftsmanship, changes from present Ohio common law, and the unprecedented discretion granted to trial judges. They emphasize that these problems will create confusion and uncertainty, results which are contrary to the avowed purposes of codifying the rules of evidence.

I. INTRODUCTION: A BRIEF HISTORY

THE FINAL DRAFT[1] of the proposed Ohio Rules of Evidence was submitted in January, 1977, to the General Assembly by the Supreme Court of Ohio under the authority of the Modern Courts Amendment of the Ohio Constitution, article IV, section 5.[2] The proposed

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1. The proposed Ohio Rules of Evidence were initially published for public comment on July 12, 1976. *Draft Ohio Rules of Evidence*, 49 OHIO B. 929–60 (1976). A synopsis of comments noting consequent changes in Ohio law was studied by the Evidence Rules Advisory Committee members, and further recommendations were given to the Ohio Supreme Court suggesting modifications in the published draft. The final product was published for review and public comment on February 21, 1977. *Proposed Ohio Rules of Evidence*, 50 OHIO B. 231–57 (1977).

2. Ohio Constitution, article IV, § 5, in pertinent part provides:

> (A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.
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> . . . .
>
> (B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January . . . and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules

Rules were the eighth set[3] of procedural rules prescribed by the supreme court since 1968 when the Modern Courts Amendment gave rulemaking authority to the supreme court. Had the proposed Rules of Evidence not been rejected by the legislature, they would have taken effect on July 1, 1977.

The Ohio rules are patterned on the Federal Rules of Evidence which went into effect on July 1, 1975.[4] The development of the Federal Rules began in 1961 when Chief Justice Earl Warren appointed a special committee which later concluded that uniform evidence rules were both feasible and advisable.[5] A second committee was designated in 1965 to recommend to the Court a set of such rules for federal courts. Between 1965 and 1972 the advisory committee produced two drafts and a final set of proposed Rules.[6]

The Supreme Court's proposed Rules were transmitted to Congress on February 5, 1973, principally under the ostensible authority of 28 U.S.C. § 2072[7] which empowers the Supreme Court of the United

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shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

3. The Ohio Supreme Court has proposed five sets of procedural rules (as opposed to rules of practice) pursuant to article IV, § 5(B) of the Ohio Constitution: (1) Ohio Rules of Civil Procedure; (2) Ohio Rules of Appellate Procedure; (3) Ohio Rules of Juvenile Procedure; (4) Ohio Rules of Criminal Procedure; and (5) Rules of the Court of Claims.

Two sets of rules have been proposed pursuant to § 5(A): (1) Rules of Superintendence for Municipal Courts, and (2) Rules of Superintendence for County Courts.

4. Pub. L. No. 93–585, 88 Stat. 1926. For a detailed history of the Federal Rules of Evidence prior to their effective date, see C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006 (1977); 10 MOORE'S FEDERAL PRACTICE §§ 10–40 (1976).

5. *See* Green, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 114 (1962).

6. In 1969 the Advisory Committee on the Rules of Evidence submitted its preliminary draft to the Standing Committee, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161 (1969). This draft was circulated to elicit comments from the bench and bar. A revised draft was then submitted to the Standing Committee. *See* Letter from Judge Albert B. Maris, *quoted in* 51 F.R.D. 316 (1971). This draft was approved by the Judicial Conference in October, 1970 and submitted to the Supreme Court, which returned the draft to the Committee for further comments. In March, 1971 the draft was printed and widely circulated. A final draft was approved by the Judicial Conference and submitted to the Supreme Court in October, 1971. *See* C. WRIGHT & K. GRAHAM, *supra* note 4.

7. 28 U.S.C. § 2072 (1970), in pertinent part provides:

The Supreme Court shall have the power to prescribe by general rules, the

States to prescribe rules of practice and procedure for the various federal courts. Congress, however, rejected the Supreme Court's proposed Rules of Evidence, on the basis that the Court, in proposing rules of evidence, had exceeded its power to promulgate rules of "practice and procedure."[8] In order to clarify its view of the Supreme

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forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . .

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

The Supreme Court also cited as authority 18 U.S.C. § 3402 (1970) (criminal procedure and appeal), 18 U.S.C. § 3771 (1970) (procedure before verdict), 18 U.S.C. § 3772 (1970) (procedure after verdict), and 28 U.S.C. § 2075 (1970) (bankruptcy).

By order dated November 20, 1972, the Supreme Court, Justice Douglas dissenting, approved the Advisory Committee's October, 1971 draft *in toto* and promulgated the Federal Rules of Evidence. Justice Douglas' primary objections were: (1) he doubted whether rules of evidence are within the purview of the statute under which the Court had authority to submit rules; (2) he was concerned that the Court did not write the Rules and was only a conduit for their promulgation; and (3) he believed that the development of the law of evidence is best left to a "case-by-case development by the courts or by Congress." 409 U.S. 1132 (1972).

8. Pub. L. No. 93–12, 87 Stat. 9 (1973). The Act was captioned: "An Act to promote the separation of constitutional powers. . . . ," reflecting Congress' judgment that rules of evidence were not the proper subject of the Supreme Court's rulemaking power. The Act insured that Congress had a full opportunity to review and study the Rules, S. REP. NO. 93–1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS. 2215.

Substantial criticism has been leveled at the wisdom of courts exercising broad rulemaking power, especially in the area of evidence. *See* Justice Douglas' dissent to the transmittal of the Federal Rules of Evidence to Congress, 409 U.S. 1132 (1972). Although the United States Supreme Court has broad powers under the Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1970) (*see* note 7 *supra*), commentators have also questioned its competency to issue rules of evidence. Professor Wickes believed that because the Supreme Court had failed since 1792 to prescribe any uniform rules of evidence, to undertake such a "revolutionary departure from the customary practice of courts . . . in the absence of clear and specific authority" appeared unwarranted. Wickes, *The New Rule Making Powers of the United States Supreme Court*, 13 TEX. L. REV. 1, 25 (1934). Others who have studied this question have concluded that the Rules Enabling Act did not include the authority to propose evidentiary rules. *E.g.*, Goldberg, *The Supreme Court, Congress and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1975). *See generally* Mitchell, *Attitude of Advisory Committee, Events Leading to Proposal for Uniform Rules*, 22 A.B.A.J. 780, 782–83 (1936). *But see* Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622, 641–44 (1935); Moore & Bendix, *Congress, Evidence, and Rulemaking*, 84 YALE L.J. 1, 11 (1974).

When Congress eventually adopted the Federal Rules of Evidence by statute, it

Court's authority, or lack of it, in this area, Congress also legislated that rules of evidence could not become effective in the federal court system until "expressly approved by Act of Congress."[9] The Federal Rules of Evidence eventually became law by Act of Congress, effective July 1, 1975.[10]

The proposed Ohio Rules of Evidence were drafted by a panel appointed by the Supreme Court of Ohio in 1975,[11] charged with the single mission of fashioning rules for Ohio's courts based upon the Federal Rules of Evidence.[12] The committee was not asked to consider the wisdom of codified rules, nor was it required to study other forms of codification, such as those that exist in Maryland,[13] New Jersey[14] or California.[15]

The committee performed its narrow duty,[16] drafted rules, and reported them to the Supreme Court of Ohio. The court approved them,[17] and under the apparent authority of the Modern Courts Amendment,[18] sent the Rules to the General Assembly.[19]

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reiterated its judgment that rules of evidence were not the proper subject of the Supreme Court's rulemaking power. In § 2 of Pub. L. No. 93–595, 88 Stat. 1948 (1975), Congress established a procedure for amending the Federal Rules of Evidence which substantially differs from the procedure for amending rules of "practice and procedure." *Compare* 28 U.S.C. § 2072 (1970), *with* 28 U.S.C. § 2076 (Supp. V 1975). The new procedure contained in 28 U.S.C. § 2076 gives either House of Congress veto power over newly proposed rules of evidence. Rules regarding privilege may become effective only if specifically approved by Congress.

The Ohio General Assembly has also drawn the inference that Congress disapproved the proposed Federal Rules because they were not the proper subject of the Supreme Court's rulemaking power. House Concurrent Resolution 14 cited the following as one of the considerations for rejecting the proposed Ohio Rules of Evidence in 1977:

> The Congress of the United States has already considered the subject of codification of the law of evidence and determined that such codification is the proper function of the legislative rather than the judicial branch of government, as evidenced by its act of March 30, 1973 (Public Law 93–12, 87 Stat. 1 [sic]) which deferred the effective date of the Federal Rules of Evidence promulgated by the United States Supreme Court until such time as they were enacted into law by statute.

See Appendix A at 2.

9. Pub. L. No. 93–12, 87 Stat. 9 (1973).

10. Pub. L. No. 93–595, 88 Stat. 1926 (1975).

11. O'Neill, *Introduction, Symposium, The Ohio Rules of Evidence*, 6 CAP. U.L. REV. 515 (1977).

12. Miller, *The Game Plan: Drafting the Ohio Rules of Evidence*, 6 CAP. U. L. REV. 549, 553 (1977).

13. MD. CTS. & JUD. PROC. CODE ANN. tit.10 (1974).

14. N.J. REV. STAT. ANN. tit. 2A, subtit. 9 (West 1976).

15. CAL. EVID. CODE § 1 (West 1968).

16. The committee's limited mission contrasts sharply with the broad task assigned to the joint select committee. Am. Sen. J.R. 25, at 2. *See* Appendix B at 2.

17. December 2, 1976.

18. OHIO CONST. art. IV, § 5(B).

19. January 12, 1977.

Ohio's Modern Courts Amendment requires the supreme court to submit any proposed rules regarding practice and procedure to the General Assembly for its consideration before such rules become effective.[20] The Ohio General Assembly received the supreme court's proposed Evidence Rules on January 12, 1977, and referred them to a joint subcommittee composed of members of the judiciary committees of both houses.[21] On April 20, 1977, the subcommittee unanimously recommended to the judiciary committees of both houses that the supreme court's proposed Ohio Rules of Evidence be rejected.[22] Ac-

20. OHIO CONST. art. IV, § 5(B). In this respect Ohio is somewhat alone in its approach to the court's rulemaking power. For example, in no state that adopted a variation of the Federal Rules of Evidence did the state supreme court formally propose rules pursuant to rulemaking power *and* submit them to the legislature for formal review. Arizona adopted the rules of evidence by order of its supreme court pursuant to article 6, § 5 of the Arizona Constitution, which empowers the court to promulgate rules without submission to the state legislature. Maine's adaptation of the Federal Rules of Evidence was accomplished pursuant to specific authority granted to the Maine Supreme Judicial Court to promulgate rules of evidence without submission to the state legislature. ME. REV. STAT. tit. 4, § 8 (1964). Similarly in Minnesota, the supreme court exercised its power to promulgate rules of evidence without submission to the state legislature. MINN. STAT. § 480-0591 (West 1971). In Nebraska, the rules of evidence were enacted by the legislature. NEB. REV. STAT. §§ 27-101 to 27-1103 (1975 Supp.). The rules became effective in Nevada also by legislative action. NEV. REV. STAT. §§ 47.020–55.010 (1975). The rules of evidence in New Mexico were promulgated under authority granted by statute to the supreme court. N.M. STAT. ANN. § 21-3-1 (Supp. 1975). The North Dakota Rules of Evidence were adopted by supreme court order pursuant to authority granted by the legislature. N.D. CENT. CODE § 27-02-11 (1974). In Wisconsin the supreme court relied on statuory authority to promulgate rules of evidence. WIS. STAT. ANN. § 251.18 (West 1971). The Michigan Supreme Court proposed rules based on the federal model, effective as of January 5, 1978. 399 Mich. 951 (1976–77). Wyoming has also recently adopted a similar set of rules under the authority of Wyoming Statutes § 5–18 (1977).

The closest resemblance to Ohio's procedure is found in the federal system where, in accordance with 28 U.S.C. § 2072 (1970), the Supreme Court of the United States proposed rules of evidence to Congress only to have Congress reject them as not the proper subject matter of court rules. *See* text accompanying notes 8–9 *supra*.

21. The Joint Subcommittee of the House and Senate Judiciary Committees on the proposed Ohio Rules of Evidence was comprised of Senators Anthony J. Celebrezze, Jr. (D.–Cleveland), Michael Schwarzwalder (D.–Columbus), Stanley J. Aronoff (R.–Cincinnati), and Representatives Paul Leonard (D.–Dayton), Terry Tranter (D.–Cincinnati) and William Batchelder (R.–Medina). Donald L. Robertson, an attorney with the Legislative Service Commission, served as staff attorney to the subcommittee. David K. Frank, counsel to the subcommittee's House minority membership, took an active interest in the subcommittee's and House's consideration of the proposed Rules as a result of his disagreement with the concept of expanded trial court discretion.

Participation by the bench and bar during the subcommittee hearings was minimal. During the three weeks of subcommittee hearings, the only persons to testify before the subcommittee were members of the Ohio Supreme Court's Evidence Rules Advisory Committee, testifying in favor of the proposed Rules, and a representative of Attorney General William J. Brown opposing adoption of the Rules.

22. *See* Appendix C at 1.

cepting the subcommittee's recommendation, the House Judiciary Committee[23] prepared House Concurrent Resolution 14 and unanimously recommended to the House of Representatives that the resolution be adopted.[24] Both houses unanimously adopted the resolution.[25]

II. REASONS FOR THE REJECTION

Ohio was the first state to reject, at least temporarily, evidence rules patterned on the Federal Rules.[26] The report[27] prepared by the joint subcommittee cited several reasons for its recommendation of rejection.[28] First, the legislature felt it did not have enough time in the five and one-half months between submission of the rules and the July 1, 1977[29] effective date to make a reasoned and careful study of the effect the Rules would have on the current law of Ohio.

Second, no exhaustive study had been made by the General Assembly to determine whether adoption of the Federal Rules is feasible

23. The committee was chaired by Harry J. Lehman (D.–Cleveland).

24. *See* Appendix A at 1.

25. On June 15, 1977, the House of Representatives adopted the resolution 91–0. OHIO HOUSE OF REPRESENTATIVES JOURNAL 1054–55, 112th Gen. Ass., 1st Sess. (1977). On June 27, 1977, the Senate followed suit, 31–0. OHIO SENATE JOURNAL 674–75, 112th Gen. Ass., 1st Sess. (1977). On September 29, 1977, the General Assembly adopted Am. Sen. Joint Resolution No. 25. OHIO SENATE JOURNAL 1123–26, 112th Gen. Ass., 1st Sess. (1977). This resolution created a joint select committee to study the proposed Ohio Rules of Evidence and to report back to the legislature by December 31, 1978. *See* Appendix B at 2.

On January 12, 1978, the Ohio Supreme Court resubmitted the proposed Ohio Rules of Evidence to the General Assembly. The Rules recently proposed are identical to those rejected in 1977. Again in 1978, the Rules were transmitted without advisory committee notes or commentary.

The fact that the court chose to resubmit the proposed Rules in 1978 threatens to create an unseemly conflict between the court and the legislature. The General Assembly by Joint Resolution 25 established a special subcommittee to study comprehensively the law of evidence in its statutory, rule, and commission law forms. The resolution set a deadline of December 31, 1978 for the special subcommittee's report. By submitting the proposed Ohio Rules of Evidence under authority of the Modern Courts Amendment, however, the court forces the legislature to act on the proposed Rules by June 31, 1978, six months short of the time the legislature considered appropriate for the subcommittee's review of the entire question of evidence reform.

26. The Florida legislature also has delayed the effective date of the Florida Rules of Evidence pending further study of the effect adoption of the Rules would have on the state bar and on the administration of justice in the Florida courts. 1977 Fla. Sess. Law Serv. 189 (West).

27. *See* Appendix C.

28. While the reasons cited in this section for the subcommittee's recommendation of rejection are those given by the subcommittee itself, the order in which they are discussed is not the order given in the subcommittee's report. Moreover, the authors have, for purposes of clarification, elaborated on some of the reasons expressed by the subcommittee. *Compare* text *with* Appendix C.

29. The effective date is established in Ohio Constitution, article IV, § 5(B).

in Ohio or whether the Rules would fit the specific needs of Ohio's courts.[30] The committee noted that after the initial promulgation of the Federal Rules by the Supreme Court of the United States, Congress devoted considerable time to a review of the Rules before enacting them into law.[31] The legislature considered it no less its responsibility to consider carefully the operation and effect of the proposed Ohio Rules of Evidence.

Third, the committee was troubled by the fact that the supreme court submitted the rules to the legislature with no explanatory material. The court sent nothing more than the text of the proposed Rules. By comparison, when the Federal Rules of Civil Procedure were modified for use in Ohio, the Advisory Committee Staff that had worked on the proposed Ohio civil rules published its commentary on the anticipated operation and effect of the new rules.[32] It has been expected that a similar commentary will be published by the Supreme Court's Evidence Rules Advisory Committee, but at the time this article was submitted for publication, the legislature had not yet been given a complete version of the Evidence Rules Advisory Committee's analysis.

The subcommittee noted in its report that the proposed Ohio Rules of Evidence contain such "broad, general principles"[33] that even lawyers who had studied the rules could not agree on a common interpretation of them. The supreme court's Evidence Rules Advisory Committee's research and analysis would have been helpful to the legislature in ascertaining the extent to which Ohio's current law of evidence would be affected by the various evidentiary innovations contained in the proposed Rules as well as in ascertaining the wisdom of such changes. With no opportunity to study the Advisory Committee's commentary, and with little time available, the legislature was left to imagine on its own the operation and ultimate effect of the proposed Rules.

Moreover, the legislature is obligated under article IV, section 5 of

30. The subcommittee noted for example that the federal courts do not have probate, domestic, bastardy, or juvenile justice matters to litigate. *Cf.* REPORT OF THE JOINT SUBCOMM. TO THE HOUSE AND SENATE JUDICIARY COMM. ON THE PROPOSED OHIO RULES OF EVIDENCE, 112th Gen. Ass., Reg. Sess. 4 (1977–78) [hereinafter cited as JOINT SUBCOMMITTEE REPORT] (federal courts do not handle domestic relations, or paternity cases, traffic violations, or forcible entry or detainer cases). *See* Appendix C, at 4.

31. The Federal Rules of Evidence were first submitted by the Supreme Court on February 5, 1973, but did not become law until January 2, 1975.

32. *See* OHIO REV. CODE ANN., Civil Rules (Page 1971). *See also* Harper, *Introduction, Ohio Rules of Civil Procedure: A Symposium*, 39 CIN. L. REV. 465, 469–70 (1970).

33. JOINT SUBCOMMITTEE REPORT, *supra* note 30, at 1; *see* Appendix C at 1.

the Ohio Constitution to pass upon procedural rules proposed by the supreme court. Without the assistance of the supreme court's Evidence Rules Advisory Committee's comments, the legislature's ability to perform its constitutional obligation was severely impaired. The legislature found itself in the unenviable position of being asked to give its final approval to the Rules while facing the distressing possibility that the Evidence Rules Advisory Committee would subsequently publish its official notes containing histories or explanations that, if known beforehand, might have influenced the legislature to disapprove the rules. The Office of the Attorney General argued to the subcommittee that it was untimely for the legislature to take the irrevocable step of approving the proposed Rules without having in final form the Evidence Rules Advisory Committee's official commentary.

Fourth, the committee could not, in the time alloted to it, determine the precise effects of the proposed Rules upon existing sections of the Ohio Revised Code. Article IV, section 5, of the Ohio Constitution provides that any laws in conflict with rules of practice and procedure adopted by the supreme court are superseded. A preliminary survey by the Legislative Service Commission concluded that more than two thousand existing Ohio statutes might be affected by the Rules as proposed.[34] The subcommittee believed that it must have a clearer view of the conflicts between the Revised Code and the proposed Ohio Rules of Evidence in order to make a measured determination as to whether it should recommend retaining a rule of evidence established by the Revised Code or recommend the adoption of the rule proposed by the supreme court. The subcommittee also believed that the effect of the proposed Ohio Rules of Evidence in a number of instances, although proposed as procedural rules, would be to create or change substantive rights.[35] The subcommittee believed that the legis-

34. Although the Ohio Supreme Court's Evidence Rules Advisory Committee was aware of the large number of statutes potentially affected by adoption of the Rules, the committee did not consider it its responsibility to determine which or how many statutes would be affected by the Rules. Miller, *supra* note 12, at 553. Professor Miller stated that:

> Although some of the 2883 references were duplications, and additional references used the key words in other than an evidentiary manner, *it was indeed frightening to contemplate the potential power and eventual impact of the final rules of evidence*. Third, who would determine what statutes would be repealed when the rules became effective? (There was indeed great relief among the Committee membership upon discovering that such an assignment was not a part of its responsibilities.)

Id. at 551 (emphasis added).

35. An example of a substantive right that could be changed by the proposed Rules is the limited guarantee of privacy presently accorded to rape victims who offer testimony against their attackers. Subsections 2907.02(D), (E), and (F) of the Ohio Revised Code place limitations on evidence of specific instances of the victim's sexual activity. This

lature was constitutionally obliged to make certain that "rules of

section conflicts with proposed Ohio Rules 102, 403, 404, 405 and 406. Under the supremacy provision of the Modern Courts Amendment, OHIO CONST. art. IV, § 5(B), the Rules would presumably prevail. Similarly, § 2743.43(A)(2) limits the use of expert medical witnesses to those who devote at least 75% of their time to clinical practice or teaching. Here, again, conflicting Rules 701–03 would seemingly prevail.

The question is not free from doubt because the Modern Courts Amendment provides that "rules governing practice and procedure . . . shall not abridge, enlarge, or modify any substantive right." The Rules will prevail over conflicting statutes only when the court finds that substantive rights are not affected. The ironic result of this requirement is that instead of bringing certainty and uniformity to evidence law, questions about the constitutional validity of many of the Rules will result because the line between substance and procedure is far from clear.

The problem of drawing the substance–procedure dichotomy became particularly acute in Ohio following the adoption of the Modern Courts Amendment in 1965. Ohio courts have traditionally held that it is the legislature which has general powers to prescribe rules of evidence subject only to constitutional limitations. Hammond v. State, 78 Ohio St. 15, 84 N.E. 416 (1908); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976). *See generally* Comment, *The Rule-Making Power of Ohio Courts*, 1 OHIO ST. L.J. 123 (1935). As the court noted in Pennsylvania Co. v. McCann, 54 Ohio St. 10, 42 N.E. 768 (1896):

> There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, over which its *legislative department has authority*, limited only by the constitutional guarantees respecting due process of law, vested rights, and the inviolability of contracts.

Id. at 17, 42 N.E. at 769 (emphasis added).

It is not clear whether the passage of the Modern Courts Amendment was meant to change the legislature's traditional authority in the evidence area. According to William W. Milligan and James Pohlman, who served as Co-Chairman and Secretary of the Modern Courts Committee: "There should now be no doubt that the authority of the Supreme Court in the rule-making area is plenary. Court action in this area supersedes contradictory legislation. The legislature retains a veto over such court made rules, but no longer has the primary responsibility." Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 829 (1968). Milligan and Pohlman noted, however, that: "There will always be cases on the borderline of substance and procedure. Since the Supreme Court, in its judicial capacity, will have the ultimate authority to determine the boundary line between procedural and substantive matters, it may be presumed that any rules promulgated by the supreme court will fall within the procedural rather than the subsantive area. An example of the borderline area is the rules of evidence. In certain states, rules of evidence are considered to be procedural, in other states substantive." Milligan & Pohlman, *supra* at 832. *But see* deleted language of H. Con. Res. 14, note 45 *infra*.

The Supreme Court of Ohio has on several occasions examined the interplay between court-made rules and substantive rights. In some cases it appears that the courts did not look on legislative approval as an evaluation of whether the rules had substantive impact. *See* Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976); State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975); Krause, Adm'r v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736, *cert. denied*, 409 U.S. 1052 (1972).

In *Krause*, it was argued that the adoption of Ohio Rules of Civil Procedure constituted a waiver of the state's sovereign immunity. The Ohio Constitution, article I, § 16, provides that suits may be brought against the state in such manner as provided by law and the Ohio Rules of Civil Procedure supposedly presented the requisite "manner." The court held that the rulemaking authority of the supreme court is limited to the

evidence adopted as rules of court should clearly relate solely to

formulation of rules governing practice and procedure, and by such rules the court may not abridge, enlarge, or modify any substantive right. Thus, because sovereign immunity is a substantive right of the State of Ohio such a change in public policy could only be waived by legislative action. *Id.* at 145, 285 N.E.2d at 744. The court recognized the difficulty inherent in assessing whether nominally procedural rules could affect substantive rights. In discussing the distinction between substance and procedure the court defined substantive law as that body of law which creates, defines, and regulates the rights of the parties in contrast to procedure which pertains to the method of enforcing rights or obtaining redress. *Id.*

In assessing the validity of its own rules, the Supreme Court of Ohio has not hesitated to invalidate rules because they were found to "abridge, enlarge or modify a substantive right." In State v. Hughes, 41 Ohio St. 2d 208, 210, 324 N.E.2d 731, 733 (1975), the supreme court invalidated Appellate Rule 4(B) because it conflicted with a substantively created right of appellate courts to exercise their discretion in determining when to allow the prosecution to appeal in certain criminal cases. In Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976), the court considered the conflict between Civil Rule 75(P) and § 3109.04 of the Ohio Revised Code over the standard for determining custody of minor children. The supreme court held that insofar as Civil Rule 75(P) abridges § 3901.04, the rule is invalid under § 5(B) of article IV of the Ohio Constitution. The court recognized that where conflicts arise between the civil rules and the statutory law, the rule will control on matters of procedure and the statute will control on matters of substantive law. 46 Ohio St. 2d at 86, 346 N.E.2d at 288 (relying on State v. Hughes, 41 Ohio St. 2d at 210, 324 N.E.2d at 733 (1975); Morrison v. Steiner, 32 Ohio St. 86, 88, 290 N.E.2d 841, 844 (1972); Krause, Adm'r v. State, 31 Ohio St. 2d at 145, 285 N.E.2d 744.

These cases present but one side of the analysis. On the other side, a pre-existing statute that relates to procedure and is inconsistent with a court rule will be held invalid. Several lower courts have recently held pleading requirements in the new Ohio court of claims and medical malpractice statutes to be unconstitutional as being inconsistent with the civil rules. *E.g.*, Jacobs v. Shelly & Sands, 51 Ohio App. 2d 44 (1976) (Court of Claims Rule 4(B) pertaining to the time for filing a removal petition takes precedence over time limitations in OHIO REV. CODE ANN. § 2743.03(E)(1) (Page 1977)); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976) (pleading requirements of Medical Malpractice Act, OHIO REV. CODE ANN. § 2307.42 (Page 1977) violate article IV, § 5(B) of Ohio Constitution); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. 1976) (pleading requirements of Medical Malpractice Act conflict with pleading provisions of the civil rules).

In promulgating the proposed Ohio Rules of Evidence under its rulemaking authority the Supreme Court of Ohio has placed itself in an untenable position. If the court takes the position that rules of evidence do in many instances "abridge, enlarge, or modify" substantive rights, then the court must, on a case-by-case basis, selectively engage in holding specific rules invalid as against specific statutes or other substantive rights. On the other hand, if the court finds the evidence rules affect only procedural rights, it will automatically invalidate legislative efforts that attracted public attention and which represented a considered policy decision. In all of these cases, the court would face not only the normal issues of statutory construction that any newly promulgated codification of rules raises, but it would have to address substantial constitutional questions in almost every case presenting evidentiary issues. Litigants would contest not only the applicability of the rules in the courtroom but also their constitutional validity. (In addition, the court may be faced with conflicting constitutional provisions. Section 39 of article II of the Ohio Constitution specifically delegates to the state legislature the power to formulate rules relating to expert testimony in criminal trials and proceedings.)

At a minimum, it may be said that if the proposed Rules become effective, many of

practice and procedure, and not to substance."[36]

Another reason expressed by the subcommittee for delaying adoption of the rules of evidence related to the histories of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Ohio adopted a variation of the Federal Rules of Civil Procedure in 1970. By then, the civil rules had been in operation in the federal courts for over thirty-two years.[37] In addition to the hundreds of cases interpreting the various rules there were more than 140 amendments, additions, and deletions made to improve their operation.[38] As a result, Ohio was able to adopt civil rules in 1970 that were somewhat refined and of relatively certain meaning. Similar development had occurred before Ohio implemented a variation of the Federal Rules of Criminal Procedure in 1975. By the time of Ohio's adoption, the criminal rules had been in effect for over twenty-nine years,[39] and more than 100 amendments, additions, and deletions had improved their operation.[40] By comparison, when the legislature received the Evidence Rules, the Federal Rules of Evidence had been in effect only since July 1, 1975, so there

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the Rules of Evidence will be of uncertain validity until the supreme court passes on whether they affect substantive rights. The present unsettled condition of state law concerning what is procedural and what is substantive only enhances the uncertainty created in the minds of legislators, litigants, and lawyers waiting for the supreme court to act. In this situation it is particularly appropriate for the legislative branch, before it allows the Rules to become effective, to offer its own view of whether particular rules affect substantive rights. (Since the supreme court's power is constitutional, any attempt to legislate on evidentiary matters after the Rules become effective could provoke a serious separation of powers conflict. For a discussion of judicial rulemaking and its conflict with legitimate legislative prerogatives, see J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 77–104 (1977).)

36. JOINT SUBCOMMITTEE REPORT, *supra* note 30, at 3; *see* Appendix C at 3.

Even if all the Ohio Rules of Evidence are ultimately found to be matters of procedure by the supreme court, *see* note 35 *supra*, perhaps they ought not to be viewed in the same light as, for example, the Rules of Civil Procedure. Evidence rules, perhaps more than other rules that are clearly procedural in nature, reflect social judgments on matters of broad public policy. *See e.g.* OHIO REV. CODE ANN. § 2907.02(D), (E), & (F) (Page Supp. 1977), discussed in note 35 *supra*. Rather than focusing on the unanswerable substance/procedure question, the legislature may simply choose not to give the supreme court control over evidentiary matters that relate to sensitive areas of social concern.

37. The Federal Rules of Civil Procedure were transmitted to Congress by Attorney General Homer S. Cummings on January 3, 1938, and became effective on September 16, 1938. FED. R. CIV. P., 28 U.S.C. at p. 7729 (1970).

38. Rule 6 of the Federal Rules of Civil Procedure, for example, has been amended as many as five times. FED. R. CIV. P. 6, 28 U.S.C.A. (Supp. 1977). The scope and methods of discovery also have been substantially changed.

39. The Federal Rules of Criminal Procedure were transmitted to Congress by Attorney General Francis Biddle on January 3, 1945, and became effective on March 21, 1946. FED. R. CRIM. P., 18 U.S.C. at p. 4479 (1970).

40. FED. R. CRIM. P. 17, 18 U.S.C.A. Rule 17 (1975) and FED. R. CRIM. P. 41, 18 U.S.C.A. Rule 41 (Supp. 3 1977), for example, have each been revised five times.

had been only slightly more than a year and a half of experience with them. The Attorney General's Office argued before the subcommittee that it would be imprudent to jettison Ohio's common law of evidence[41] in favor of a codification that would probably require at least as much interpretation, adjustment, and refinement as the earlier procedural rules. Indeed, at the time the legislature was asked to act, the Federal Rules of Evidence had been fleshed out by only sparse case law.[42] Finally, the subcommittee questioned whether the bench and bar were prepared to operate under these Rules, and whether concerned parties recognized that the proposed Ohio Rules of Evidence are new both in language and, what is more important, in judicial philosophy.[43]

While the reasons cited above were those given by the subcommittee for its recommendation that the Rules be rejected, the House of Representatives and the Senate had additional reasons for rejecting the

41. Ohio Constitution, article IV, § 5(B) provides: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." For a discussion of the relationship between statutory enactments and court-made rules, see note 35 *supra*.

42. Some of the provisions in the Federal Rules of Evidence that were most innovative and/or controversial had received very little discussion by the federal courts prior to the time the Ohio General Assembly received the proposed Rules. For example, Rules 803(24) and 804(b)(5), the so-called residual hearsay clauses, were highly controversial throughout the drafting, promulgation, and congressional consideration of the Federal Rules of Evidence. Different methods of treating the hearsay rule and its exceptions were proposed at every stage of consideration. The Supreme Court's Advisory Committee's proposal, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161 (1969), the final draft submitted to Congress, *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315 (1971), the House version, H.R. REP. NO. 650, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7079, and the Senate version, S. REP. NO. 1277, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7065–66, each adopted a different approach to the problem. The Congressional Conference Committee rejected them all and adopted yet another version. CONF. REP. NO. 1597, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7106.

Yet, at the time the Supreme Court of Ohio transmitted the proposed Ohio Rules of Evidence, only one federal appeals court had discussed the operation of the highly controversial Rule 803(24). In Muncie Aviation Corp. v. Party Doll Fleet, 519 F.2d 1178 (5th Cir. 1975), the court held that a Federal Aeronautics Administration advisory circular on the standard of care for airplane landings, although hearsay, was admissible under Rule 803(24). The circular was without the force or effect of law but was offered as evidence of the "care customarily followed by pilots." Although the circular was offered for a hearsay purpose and was not within any of the recognized exceptions, the court found adequate "external circumstantial guarantees of trustworthiness" required by Rule 803(24) in the fact that it was "published by a government agency whose only conceivable interest was in insuring safety." 519 F.2d at 1182. *See also* United States v. Gomez, 529 F.2d 412 (5th Cir. 1976).

Similarly, only one reported court of appeals case had dealt with Rule 804(b)(5) at that time. United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). *See* text accompanying notes 125–31 *infra*.

43. JOINT SUBCOMMITTEE REPORT, *supra* note 30, at 5; *see* Appendix C at 5.

proposed Rules. For example, the resolution adopted by both houses noted that the proposed Ohio Rules of Evidence "create new areas of broad, virtually unreviewable discretion and otherwise effectuate numerous changes in the law of evidence currently recognized in this state, which has for years served the interests of impartial justice and has evolved from the experience of several centuries . . . ."[44] Moreover, the resolution in its final form[45] observed that Congress has concluded that "codification of the law of evidence . . . is the proper function of the legislative rather than the judicial branch of government."[46]

III. THE ATTORNEY GENERAL'S OPPOSITION TO THE PROPOSED OHIO RULES OF EVIDENCE

The Office of the Attorney General opposed adoption of the proposed Ohio Rules of Evidence in any form. Several of the reasons expressed in the report submitted by the joint subcommittee and in the concurrent resolution had been urged by the Attorney General's Office at various times during the legislative hearings. The Attorney General's opposition, however, was focused on two principal grounds of concern. First, close review of the proposed Ohio Rules of Evidence revealed poor draftsmanship and/or startling content in about twenty of the proposed rules.[47] Some of the problems of content and draftsman-

44. H. Con. Res. 14; *see* Appendix A at 1.

45. The Concurrent Resolution in the form originally presented to the House Judiciary Committee contained the following reason, among others, for rejecting the supreme court's proposed Ohio Rules of Evidence:

> It was not the General Assembly's intent in the adoption of the Modern Courts Amendment to the Ohio Constitution, and specifically, Section 5(B) of Article IV of said Constitution, to grant The Ohio Supreme Court the authority to promulgate rules codifying the law of evidence. . . .

By a vote of 8–7, the House Judiciary Committee deleted the quoted language. The motion to delete was hotly debated. Representative William Batchelder (R.–Medina) spoke at length for retention of the language arguing that it accurately reflected the intent of the General Assembly that proposed the Modern Courts Amendment. Representative Paul Leonard (D.–Dayton), chief sponsor of Concurrent Resolution 14 and whose motion it was to delete the language, stated that he agreed with Representative Batchelder's argument about the legislature's understanding of the Modern Courts Amendment's meaning. He urged deletion, however, because he considered the language unnecessarily inflammatory in light of other adequate reasons to reject the proposed Ohio Rules of Evidence.

46. H. Con. Res. 14; *see* Appendix A at 2.

47. This article does not purport to be a comprehensive analysis of all of the problems associated with each of the proposed Rules the authors find troublesome. Some of the problems with proposed Rules 102, 402, 403, 407, 501, 608, 612, 613, 701, 702, 703, 705, 801, 803, and 804 are discussed in greater or lesser detail in this article. By discussing these specific Rules, the authors intend to illustrate generally the kinds of draftsmanship and content problems that also exist in other Rules such as proposed Rules 103 (rulings on evidence); 106 (remainder of or related writings or recorded

ship are inherited directly from the Federal Rules of Evidence while others are peculiar to Ohio's version of the rules. Second, there was fundamental concern over the unprecedented amounts of discretion granted to trial judges.[48]

A. *Criticism of Specific Rules*

Rule 612 illustrates a problem of draftsmanship that is Ohio's unique contribution to the confusion generated by the Rules. The rule addresses the question of counsel's access to writings used by witnesses to refresh recollection either prior to or during testimony.[49] Current Ohio law provides that if a witness uses a document to refresh his recollection while he is on the stand, opposing counsel is entitled to inspect that document.[50] If, however, a witness uses a document prior to taking the stand, opposing counsel is not entitled to have access.[51] The proposed Rule seeks to give opposing counsel access to the document in the latter situation if the trial court in its discretion so orders. The ambiguity in the proposed Ohio Rule lies in this new grant of discretion. While Federal Rule 612 makes it abundantly clear that the discretion exists only with respect to documents used before testifying,[52] one cannot say

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statements); 404 (character evidence not admissible to prove conduct; 609 (impeachment by conviction of crime); 611 (mode and order of interrogation and presentation); 704 (opinion on ultimate issue); 706 (court appointed experts); and 802 (hearsay rule).

48. The Attorney General's Office has also expressed concern over whether the General Assembly will be precluded from legislating in the area of evidence once the Rules are put into effect because of the constitutional authority of the Modern Courts Amendment. *See* note 35 *supra*.

49. Proposed Ohio Evidence Rule 612 provides in part:

> Except as otherwise provided in criminal proceedings by Rule 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure, if a witness uses a writing to refresh his memory for the purpose of testifying either *(a) while testifying, or (b) before testifying, if the court in its discretion determines it is necessary in the interests of justice*, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . . (Emphasis added).

50. It is well settled that the opposing party has the right on demand to inspect and use for cross-examination any paper or memorandum which is used by the witness on the stand. State v. Taylor, 83 Ohio App. 76, 77 N.E.2d 279 (1947).

51. *See, e.g.*, State v. Smith, 50 Ohio App. 2d 183, 201, 362 N.E.2d 1239, 1249 (1977); State v. Strain, 84 Ohio App. 229, 231–32, 82 N.E.2d 109, 110–12 (1948).

52. Federal Evidence Rule 612 provides in part:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . .

with any certainty whether the clause creating discretion in Ohio Rule 612 refers only to a writing used "(b) before testifying" or whether it also refers to a writing used by a witness "(a) while testifying."[53]

The difficulty in resolving this ambiguity can be illustrated by comparing proposed Rule 612 with proposed Rule 407, for Rule 407[54] presents a similar problem of interpretation. In this instance, however, the ambiguity is inherited from Rule 407 of the Federal Rules of Evidence. The Rule restates the generally accepted principle that evidence of remedial measures taken after an event occurs is not admissible to prove negligence in causing the event.[55] Exception to the general rule is made, however, if the evidence is offered for another purpose, "such as proving ownership, control, or feasibility of precautionary measures, *if controverted*, or impeachment."[56] The ambiguity in the proposed Rule is caused by uncertainty as to what the condition "if controverted" applies. Does the phrase "if controverted" refer only to the phrase immediately preceding it or to the entire series preceding it in the sentence? For example, may a plaintiff introduce evidence of remedial measures in its case-in-chief in order to show that the defendant owned the premises on which an injury occurred, or must ownership be controverted before the plaintiff may introduce such evidence? Note that the syntax of the troublesome sentence in Rule 407 is identical to the syntax in Rule 612 discussed above. Both contain a series of words or phrases followed by a conditional clause or phrase, but it is not clear how much of the series of words or phrases is made contingent upon the subsequent condition. In order to read each rule in a way that would minimize the change in existing law,[57] the same syntactical construction would have to be

53. One commentator has provided a rationale for the change by suggesting that Ohio attorneys have abused their right to inspect writings used prior to testifying in conducting "fishing expeditions." *See* Miller, *Our Witness: Testimony at Trial*, 6 CAP. U.L. REV. 555, 573 (1977). He cites no authority, however, for his assertion that there is a right in Ohio to inspect such writings and the authors have found no cases to that effect. Nor does Professor Miller cite authority for the proposition that this right is abused.

54. Proposed Ohio Evidence Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

55. Lacy v. Uganda Dev. Corp., 29 Ohio Ops. 2d 177, 195 N.E.2d 586 (Ct. App. 1964).

56. Proposed OHIO EVID. R. 407 (emphasis added).

57. It should be noted that neither in Rule 102 nor elsewhere in the Rules is it

construed in two different ways. In other words, to minimize the extent of change in existing law, in Rule 612 the clause "if the court in its discretion . . ." must be read to modify only the latter phrase in the series, *i.e.*, "before testifying." In Rule 407, however, in order to minimize change in the law, the clause "if controverted" must be read to modify the entire preceding series. Is minimal change in the law nevertheless the desired interpretation, or were Rules 407 and 612 constructed in the same way intentionally? If the latter is so, one or the other of the Rules would substantially change existing law. How then does one resolve whether: (1) the Rules have the same structure but are to be construed differently; or, (2) the Rules have the same structure and are to be construed similarly, but one or the other is intended to change existing law? The Rules as proposed create the ambiguity but provide no guide for resolving it.

Faced with this problem, one might hope that ambiguities such as these would be clarified by the Evidence Rules Advisory Committee Notes. It is one thing, however, to resort to an extrinsic, unofficial commentary such as Advisory Committee Notes to understand the scope of a rule that is pregnant with innovative implications; it is quite another matter to look to an unofficial commentary simply to understand the bare syntax and construction of poorly drafted rules. The existing Ohio law on the issues covered in both Rule 407 and Rule 612 is abundantly clear and all but universally understood by the Ohio trial bar. Are existing law and practice to be changed? The Ohio Supreme Court intended to advance certainty and uniformity by proposing the Ohio Rules of Evidence;[58] instead, the proposed Rules would actually introduce confusion and uncertainty into heretofore settled evidentiary matters.

Rule 613(B)[59] is another example of seemingly poor draftsmanship. The Rule provides that a witness may not be impeached by extrinsic proof of a prior inconsistent statement unless the witness "is

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suggested that when in doubt one is to construe the Rules in a way that minimizes the change in existing law.

58. O'Neill, *supra* note 11, at 516.

59. Proposed Ohio Evidence Rule 613(B) and Federal Evidence Rule 613(b) in pertinent part provide:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible *unless the witness is afforded an opportunity to explain or deny* the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(D)(2). (Emphasis added).

For a recent criticism of Federal Rule 613, see Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*; 75 MICH. L. REV. 1565, 1601–10 (1977).

afforded an opportunity *to explain* or deny'' the prior, allegedly inconsistent statement. If the witness' attention is drawn to the statement, the statement may be introduced under the new Rules for the truth of the matter contained therein.[60] The problem with the Rule as proposed is that the impeaching party apparently may introduce proof of the prior statement even though the witness readily admits making the prior statement. Allowing extrinsic proof of a prior inconsistent statement when the witness admits making it departs from existing Ohio law[61] as well as from the common law. Of course, a rule is not poorly drafted merely because it changes existing law; but this Rule is ill conceived because there is no logic in changing the existing evidence law. If a witness admits making a prior inconsistent statement, there is simply no need to introduce extrinsic evidence to prove that the witness did make it. Yet, Rule 613(B), as copied from the Federal Rules, seems to permit extrinsic proof even when the witness admits the statement and tries to explain it. The Advisory Committee Note to Federal Rule 613(b) does not address this issue, although two other rules could deal with it,[62] and it is not known what the drafters of the Ohio Rule intended. One commentator has noted, however, that proposed Ohio Rule 613(B) was intended to change existing law to some extent,[63] but he did not discuss whether it was intended to permit cumulative proof of prior inconsistent statements.

Rules 407, 612 and 613 demonstrate that there is cause for legitimate concern about the draftsmanship of the proposed Rules. Other

60. Proposed OHIO EVID. R. 801(D)(1) and proposed OHIO EVID. R. 803(24). The use of a prior inconsistent statement to prove the matter contained in the statement rather than merely to test the credibility of the witness is a change in Ohio evidence law. The law of Ohio has consistently held that prior inconsistent statements may be used only to impeach the witness' credibility. *See, e.g.*, State v. Duffy, 134 Ohio St. 16, 15 N.E.2d 535 (1938); Mills v. State, 104 Ohio St. 202, 203–05, 135 N.E. 527, 528 (1922).

61. Ohio evidence law requires that before his prior inconsistent statement may be proved, a witness must be confronted with the statement and either have denied making it or be unable to admit or deny. Blackford v. Kaplan, 135 Ohio St. 268, 270, 20 N.E.2d 522 (1939); Cincinnati Union Terminal Co. v. Banning, 27 Ohio N.P. (n.s.) 548, 553–54 (1929), where the court observed:

> The rule is so well settled, as to need the citation of no authorities, that where a witness is asked with reference to what is claimed to be inconsistent statements and replies either that he did not make the statement or that he does not remember, the impeaching witness's [sic] testimony is competent to go to the jury.

62. It is possible that the Federal Rules drafters anticipated that this problem would not arise because Federal Rules 611 and 403 give judges discretion to disallow evidence that will waste time. This seems to be another example where the drafters of the Federal Rules of Evidence are relying upon discretion to operate rather than a rule of law. *See* text accompanying notes 147–54 *infra*. The better solution would seem to be to eliminate the ambiguity in the first instance.

63. *See* Miller, *supra* note 53, at 575.

rules prompt concern because of their content. The Attorney General's Office argued before the legislature's evidence rules subcommittee that the innovations contained in some of the Rules might lead to shocking changes, the full range of which would not become apparent until the Rules were actually applied.

Rule 701, the lay witness opinion rule, contains one of the more notable changes in the law of evidence.[64] It purports to remove all restrictions from the use of opinions of lay witnesses, subject to two rather loose limitations. First, the lay witness' opinion must be based on the "perception of the witness" and second, the judge must feel that the lay witness' opinion would in some way be "helpful" to the jury. While it has been suggested that this Rule may not be as great a change in Ohio evidence law as first appears,[65] it is, nevertheless, one of the rules that prompted the Attorney General's office to urge delay in the adoption of the Ohio Rules of Evidence until the federal courts interpreted its federal counterpart. At the time it was required to pass judgment on the proposed Rules, the legislature could not appreciate the potential scope of the change the rule would make in existing law.

One of the first cases interpreting Federal Rule 701, decided after the conclusion of legislative hearings on the proposed Ohio Rules, was *United States v. Smith*.[66] One of three defendants was charged with misapplication of federal funds while he was an administrator of a federally funded employment program.[67] The trial court had permitted a lay witness to express her opinion as to the *mens rea* of the defendant; she was permitted to testify whether she thought that the defendant "knew and understood" the law when he committed the acts for which he was charged.[68] The Fifth Circuit affirmed the conviction holding that such expressions of opinion are proper under Rule 701 because they might be "helpful" to the jury.[69] Admitting such an opinion is contrary, of course, to the great weight of authority at

64. Proposed Ohio Evidence Rule 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

65. Young, *Opinions and Expert Testimony*, 6 CAP. U.L. REV. 579, 582–83 (1977). Current Ohio law on lay opinion testimony is stated in American La. Pipe Line Co. v. Kennerk, 103 Ohio App. 133, 140–41, 144 N.E.2d 660, 667 (1957) (citing Balitimore & Ohio R.R. Co. v. Schultz, 43 Ohio St. 270, 282, 1 N.E. 324, 332 (1885)) (lay witnesses must confine their testimony to the concrete facts within their own knowledge, leaving inferences or conclusions to be drawn by the court or jury).

66. 550 F.2d 277 (5th Cir. 1977).

67. *Id* at 279–81.

68. *Id.* at 281.

69. *Id.*

common law[70] and current Ohio law.[71] Whether the drafters of the Federal Rules of Evidence intended to make admissible precisely the kind of opinion expressed in *Smith* cannot be determined with any certainty, nor is it relevant. What is relevant is that Rule 701 does not preclude the introduction of that kind of opinion, and what is more important, the federal courts are so construing the Rule. Ohio is wise to have delayed adoption of so open-ended a rule as Rule 701 until it can be seen what interpretation other courts give it, for a rule of such potential breadth neither has certain meaning nor is capable of predictable application.[72]

Other rules do not make such obvious changes in the law, but rather are so broadly and imprecisely written that one cannot say with any certainty that a particular rule does not change existing law. Often, the Rules are no more than broad statements of principle, or they create broad areas of discretion. As a result, even the most thoughtful prediction as to their possible meaning is no match for the inventiveness of trial counsel in the press of litigation.[73] Rule 702 (expert testimony)

70. 7 WIGMORE, EVIDENCE § 1963 (3d Ed. 1940).

71. *See* American La. Pipe Co. v. Kennerk, 103 Ohio App. 133, 140–41, 144 N.E. 2d 660, 667 (1957). *See also* note 65 *supra*.

72. Rule 701 illustrates that trial and appellate court rulings on evidence are no longer predictable under the Federal Rules of Evidence. Consider the results of two recent federal bank robbery cases where the issue was the identification of the defendant as the individual in surveillance camera photographs of the robbery. In United States v. Calhoun, 544 F.2d 291 (6th Cir. 1976), the court reversed Calhoun's conviction for armed robbery. At trial the government had offered the testimony of Calhoun's parole officer to demonstrate that Calhoun was the same individual shown in the photographs of the robbery. The court held that because of Federal Rules 701 and 403 the parole officer should not have been permitted to testify as to whether the photographs resembled the defendant. In discussing Rule 701, the court pointed to the Advisory Committee notes which imply that the processes of the adversary system must be operative when lay opinion is admitted. When an essential process, such as cross-examination, cannot operate, Rule 701 cannot be used to admit lay opinion testimony. *Id.* at 295. The court also found that Rule 403 supported their construction of Rule 701 because the risk of "unfair prejudice" due to an incomplete cross-examination outweighed the probative value of the testimony. *Id.* at 296.

Compare this result with United States v. Robinson, 544 F.2d 110 (2d Cir. 1976), where the defendant's conviction for bank robbery was reversed because of the trial court's exclusion of lay witness opinion testimony. In *Robinson*, a correctional officer was prepared to testify that the photo of the bank robbery indicated that the participant was not the defendant. The court of appeals held that the testimony would have been helpful to a determination of whether the defendant did participate in the robbery.

Thus, two courts applying the same rule have found reversible error, one in the admission of lay witness film identification testimony and the other in its exclusion. *See* Young, *supra* note 65, at 583.

73. As Professor Hahlo notes:

> It is customary to blame the shortcomings of legislation on the draftsman who failed to foresee problems which, looked at with "hindsight," were "obviously" bound to arise. The fact, however, is that even the best draftsmanship

demonstrates just such a problem of interpretation.[74] On its face it does not appear to change existing Ohio law.[75] Yet, as interpreted by a federal appellate court, Rule 702 would work a substantial, albeit perhaps unintended, change in Ohio law.

Under existing Ohio law and practice, it is well settled that expert testimony is admissible if it is expressed in terms of "reasonable scientific certainty."[76] If the expert's testimony is expressed merely in terms of "likelihood" or anything less than "probable," the testimony is not admissible.[77] In *United States v. Cyphers*,[78] however, the Seventh Circuit found no error in the admission of expert testimony that certain specimen hairs "could have come" from the defendant,[79] because Rule 702 vests the trial judge with "broad discretion . . . to decide whether expert testimony may assist the jury's deliberation."[80]

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cannot prevent future disputes on the interpretation of statutory provisions. "No finite wisdom can provide for the infinite and unknown variety and complexity of future cases." The impossibility of foreseeing the future and the imperfections of language insure that there will always be debatable points in the application of a statutory rule to borderline cases.

Hahlo, *Here Lies the Common Law: Rest in Peace,* 30 MOD. L. REV. 241, 250 (1967).

74. *See* Young, *supra* note 65, at 584. Proposed Ohio Evidence Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

75. *See* Young, *supra* note 65, at 584. *Compare* proposed OHIO EVID. R. 702 *with* McKay Machine Co. v. Rodman, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967) (syllabus).

76. State v. Holt, 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969) (expert testimony concerning neutron activation analysis to be admissible must be to a reasonable scientific certainty); Shepherd v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1943) (testimony of expert witness in workmen's compensation case must establish direct causal relationship of injury to disability with reasonable medical certainty).

77. 17 Ohio St. 2d at 85, 246 N.E.2d at 368.

78. 553 F.2d 1064 (7th Cir. 1977). The court in *Cyphers* distinguished the Ohio law by saying that in *Holt* the expert was giving a conclusion while the expert in *Cyphers* was expressing an opinion. This is a distinction without a difference.

79. *Id.* at 1071–72.

80. *Id.* at 1072. For a discussion of the impact of Federal Rule 702 on the "reasonable scientific certainty" requirement, see McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 479–80 (1977). The content of Rules 703 and 705 also cause concern because of what they clearly say, not because of their uncertainty or imprecision. Proposed Ohio Evidence Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Proposed Ohio Evidence Rule 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Substantial uncertainty exists as to whether the supreme court has the power to promul-

If the Rules are adopted and Ohio courts follow *Cyphers*, Rule 702 would dramatically alter Ohio law.

Finally, perhaps the most striking example of both poor draftsmanship and troublesome content is Rule 402.[81] It asserts the major tenet of the proposed Ohio Rules of Evidence: subject to certain limitations, all relevant evidence is admissible, and all evidence that is irrelevant is inadmissible. The Rule provides specifically that evidence otherwise relevant may nevertheless be rendered inadmissible by several causes, one of which is an "Act of Congress." That provision is incorporated into the proposed Ohio Rules from the Federal Rules of Evidence. As it is written, the "Act of Congress" language would make Ohio's own law of evidence subject to congressional legislation.

The easiest explanation for the language is that its inclusion is a mere oversight, but a close analysis of the Rules does not support this interpretation. The phrase "Act of Congress" appears in nine separate places in the Federal Rules of Evidence, eight of which could be carried over to the state rules.[82] Because the Ohio draftsmen deleted four[83] of the eight references when they adapted the Federal Rules for use in the Ohio courts, one must infer that in those four instances the draftsmen concluded that reference to federal legislation was inappropriate. One may conclude that where the draftsmen retained the reference to federal legislation,[84] they did so after similar consideration. In

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gate such rules regulating the use of expert witnesses at least in criminal trials and proceedings, because a specific constitutional provision, Ohio Constitution, article II, § 39, gives this responsibility to the legislature. Article II, § 39, states that: "Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings." Apparently the advisory committee did not assess the impact of this amendment on the proposed Ohio Evidence Rules. For a discussion of the operation of Federal Rules 703 and 705, see McElhaney, *supra* at 480–89.

81. Proposed Ohio Evidence Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, *by Act of Congress*, by statute enacted by the General Assembly not in conflict with an existing rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible. (Emphasis added).

82. The phrase "Act of Congress" is contained in Federal Rules 301 (presumptions); 402 (admissibility); 501 (privileges); 802 (hearsay); 901(10) (authentication by methods provided by statute or rule); 902(4) (self-authentication, certified copies of public records); 902(10) (self-authentication by presumptions under Acts of Congress); 1002 (requirement of original); and 1103 (title).

83. Reference to federal legislation is deleted from Ohio Rules 301, 501, 901(10), and 1002.

84. Reference to federal legislation is retained in Ohio Rules 402, 802, 902(4), and 902(10). Rules 402 and 802 specifically refer to "Act of Congress," while 902(4) and 902(10) have been modified somewhat to refer to "any law of the United States."

The intended meaning of the phrase "Act of Congress" is clear at least as far as the Federal Rules are concerned. Federal Rule 410 as enacted states: "Except as otherwise provided in this rule," but the House Committee had recommended "Except . . . by

other words, unless one assumes that the Evidence Rules Advisory Committee randomly deleted some of the references to congressional acts, one must conclude that where the phrase "Act of Congress" was retained, the committee did so as a result of a deliberate choice. Furthermore, in comparing the wording of the Ohio Rule with that of the Federal Rule,[85] we may infer that because the Ohio drafters changed the language *surrounding* the phrase "Act of Congress" they considered the inclusion of that phrase as well.[86]

Whether the inclusion was due to a mere oversight or to an intentional choice, the effects of this language are so profound as to warrant careful and serious consideration. Rule 402, as proposed, is a curious innovation in theory and a startling innovation in practice. It is curious in theory because it is difficult to conceive why Ohio might choose to make its own local evidence law subject to federal legislation. Note that what is made subject to federal legislation is not just evidentiary principles found to exist in the Constitution of the United States.[87] Rather, the proposed Ohio Rules of Evidence would retain not only federal control over Ohio's local evidence law in areas of constitutional concern, but it would expand that control to include any evidentiary matter on which Congress might choose to legislate.

This innovation is all the more striking when one compares the broad authority given to Congress with the restricted authority given to the Ohio General Assembly. Rule 402 would allow the Ohio legislature to make relevant evidence inadmissible only if the legislation is "not in conflict with an existing rule of the Supreme Court of Ohio."[88]

Act of Congress." H.R. REP. NO. 650, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7082. The Conference Committee Report indicates that the enacted language means that any subsequent Act of Congress which is inconsistent with Rule 410 will supersede it. CONF. REP. NO. 1597, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7100.

85. Federal Rule 402 provides:

> All relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

86. Of the other states that have adopted rules based on the Federal Rules of Evidence, Nebraska and North Dakota retain the phrase "Act of Congress" in their rules equivalent to Federal Rule 402.

87. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

88. Proposed OHIO EVID. R. 402. The precise meaning of this phrase is elusive. It might mean at least two very different things. The ambiguity centers on the word "existing." If it refers to supreme court rules in effect at the time legislation affecting admissibility is passed, then it suggests that the General Assembly is free to pass any law affecting admissibility of evidence so long as the supreme court had not issued a rule

Congress, on the other hand, is conceded the power to supersede virtually any existing evidence rule of the Ohio Supreme Court. Proposed Ohio Rule of Evidence 402 does not appear, at least, to limit the effect of an Act of Congress in the same way that the power of the state's own legislative body is restricted. Thus, once over the novelty of making local evidence questions subject to federal legislation, a certain anomaly remains in allowing Congress great power to preempt the state court rules while limiting that power in the hands of the Ohio General Assembly, the legislative body more directly and intimately aware of local policy and concerns.[89]

This language of Rule 402 is striking as a practical matter as well. An example will demonstrate the practical effect of making the admission of evidence subject to an "Act of Congress." Discovery in federal criminal cases of statements and reports in the hands of the government is controlled by the Jencks Act.[90] That statute makes a witness' testimony inadmissible if the government chooses not to comply with certain specific disclosure requirements. The Jencks Act is broader in its disclosure provisions than current Ohio criminal discovery rules.[91] Proposed Ohio Rule of Evidence 402 raises the very real possibility that the Jencks Act will be controlling law in Ohio prosecutions. A similar prospect exists with respect to other federal

covering the issue. Once the supreme court issues a rule, inconsistent legislation is repealed. This interpretation is consistent with article IV, § 5(B) of the Ohio Constitution. The problem is that this construction renders the word "existing" wholly redundant and thus is not likely to be the intended interpretation.

As a second interpretation, the word "existing" might refer to supreme court rules already in operation "at the time the Rules of Evidence take effect." This interpretation gives the word "existing" some meaning, albeit perhaps arbitrary. It would mean that the legislature may pass laws respecting the admissibility of otherwise relevant evidence provided only that it may not legislate on any matter on which the supreme court had already issued a rule at the time the Ohio Rules of Evidence take effect. This interpretation seems unwise if only because it would tie the legislature's power to act to the state of the supreme court's rules at an arbitrary moment in history.

The meaning of this phrase is all the more puzzling in light of the question whether the legislature may enact laws with respect to evidence at all if rules of evidence proposed by the supreme court are "rules of practice and procedure" within the meaning of Ohio Constitution, article IV, § 5(B).

89. The anomaly is more pointed when one considers the procedure for amending the Evidence Rules. The General Assembly is precluded by proposed Ohio Rule 402 from enacting any legislation inconsistent with a supreme court evidence rule. Rather, changes in the Rules must be proposed by the supreme court and transmitted to the General Assembly for consideration. *See* Ohio Const. art. IV, § 5(B). Yet by Rule 402, Congress would have authority to change the Ohio evidence law even on nonconstitutional matters although neither the Ohio Supreme Court nor the General Assembly has any review or veto over the congressional action.

90. 18 U.S.C. § 3500 (1970).

91. *Compare* 18 U.S.C. 3500 (1970) *with* OHIO CRIM. R. 16.

statutes pertaining to the admissibility of evidence.[92]

In short, the inclusion of "Act of Congress" in proposed Rule 402 and elsewhere would work far-reaching and uncontrollable changes in Ohio evidence law. While it appears that the drafters deliberately chose to retain the "Act of Congress" language, the consequences of that choice appear not to have been adequately analyzed.

B. *The Larger Concerns*

Although there are numerous instances of troublesome draftsmanship and content in the proposed Rules, the strongest objection of the Attorney General's Office is to the vast, unprecedented discretion granted to trial judges by the proposed Rules. Discretion recognized by the proposed Ohio Rules of Evidence ranges from the trial judge's traditional discretion in controlling such matters as the mode and order of interrogating witnesses to several newly conceived areas of discretion. There are a number of examples of the latter. Rule 403[93] expressly confers power upon the trial judge to exclude evidence *that is otherwise clearly admissible* under some other principle of evidence if the judge, for example, feels that the evidence will "waste . . . time" or mislead the jury. The breadth of discretion given by Rule 403 is as broad as the Rules of Evidence themselves, for on its face Rule 403 "apparently cuts across the entire body of the Rules, and allows ad hoc exclusion where prejudice, time and the like are deemed to outweigh probativity."[94] Rule 701[95] allows the introduction of lay opinion testimony if rationally based on perception and if the judge feels the lay witness' opinion will be "helpful" to the jury. Rule 705[96] makes it

92. *See, e.g.*, 18 U.S.C. § 3501 (1970) (admissibility of confessions); 18 U.S.C. § 2518 (1970) (wiretap and electronic surveillance). A study of the full extent to which federal statutes control or influence admission of evidence in federal civil and criminal cases was not undertaken by the authors, nor it seems, by the Ohio Supreme Court or its Evidence Rules Advisory Committee.

93. Federal Evidence Rule 403 and proposed Ohio Evidence Rule 403 are identical. Both provide:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

94. Rothstein, *Some Themes in Proposed Federal Rules of Evidence*, 33 FED. B.J. 21, 29 (1974); *see also*, Dolan, *Rule 403, The Prejudice Rule in Evidence*, 49 S. CALIF. L. REV. 220 (1976).

95. Both Federal Rule 701 and proposed Ohio Rule 701 provide:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

96. Federal Rule 705 and Proposed Ohio Rule 705 both provide that:

> The expert may testify in terms of opinion or inference and give his reasons

a matter of the judge's discretion whether to require an expert witness to disclose the facts and data that underlie an expert's opinion. Rule 706[97] gives the trial judge discretion to select and appoint his own expert witnesses. Rules 803(24)[98] and 804(B)(6)[99] confer new, broad discretion on the trial judge to fashion his own, case-by-case exceptions to the general rule that hearsay evidence is inadmissible.

Over twenty of the proposed Rules expressly allow the exercise of judicial discretion, many in areas where the law of evidence had never before recognized the matter to be within the discretionary power of the trial judge.[100] The discretion created by the Rules of Evidence,

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therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

97. Federal Evidence Rule 706 and proposed Ohio Evidence Rule 706 are virtually identical with regard to the trial judge's authority to appoint his own expert. Except for the bracketed portion, which appears in the Federal Rule but not in Ohio's version, both rules in pertinent part provide:

> The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint [any expert witness agreed upon by the parties, and may appoint] expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

98. Federal Rule 803(24) and proposed Ohio Evidence Rule 803(24) are identical in providing that:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [can be admitted] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

99. Federal Rule 804(b)(5) and proposed Ohio Evidence Rule 804(B)(6) are identical to each other and to both Federal Rule 803(24) and proposed Ohio Evidence Rule 803(24).

100. Discretion is expressly granted in some form in at least twenty of the proposed Ohio Rules of Evidence: Rules 103, 104, 106, 201, 403, 404, 608, 611, 612, 613, 614, 615, 701, 702, 705, 706, 803, 804, 1003 and 1006. Some merely recognize matters traditionally considered within the trial court's discretion: Rule 611(A) (court control over the mode and order of interrogating witnesses and presenting evidence). Other discretionary rules are innovative: Rule 706(A) (appointment of experts by the court), and Rule 803(24) and its companion provision in 804(B)(6) (residual hearsay exceptions). The remainder of the

however, is far broader and more radical than first appears on the face of those rules that expressly grant discretion. Furthermore, the Ninth Circuit decision in *United States v. Batts*[101] illustrates that even those rules that are mandatory on their face may be interpreted to be discretionary.

In *Batts* the defendant had been cross-examined about specific instances of prior misconduct.[102] Unhappy with the defendant's response, the cross-examiner introduced on rebuttal extrinsic evidence in the form of conflicting testimony to impeach the defendant with proof of alleged prior misconduct.[103] Rule 608(b) expressly prohibits use of extrinsic evidence to impeach a witness in this manner.[104] The trial judge, however, admitted the extrinsic evidence and the Ninth Circuit affirmed, holding that the trial court has threshold discretion in deciding whether to apply a particular rule of evidence even though the rule itself is mandatory by its language.[105] The court reasoned that because the overriding purpose of the Federal Rules of Evidence as stated in Rule 102[106] is to ascertain truth, a single rule of evidence must not be read in isolation.[107] Thus, a trial judge must be given discretion to

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Rules, to the extent that they announce a rule of evidence at all, are on their face categorically mandatory or prohibitory. *See, e.g.*, Rule 605 (the judge presiding at a trial may not testify in that trial as a witness).

Surprisingly little scholarly criticism exists in this country analyzing the effect of judicial discretion on the nature of the legal process. There is no judicial counterpart to Professor Davis' important work on administrative discretion. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969). *See, e.g.*, R. BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS (1931); I. LEE & B. OVERTON, JUDICIAL DISCRETION (1974); Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971). Finally it is notable that criticism has also been leveled at the proposed Canadian Evidence Code. Portions of the proposed Canadian Code are similar to the proposed Ohio Rules of Evidence in that they broaden trial court discretion to fashion new rules on a case-by-case basis. *See* Anderson, *A Criticisn of the Evidence Code: Some Practical Considerations*, 11 U. BRIT. COL. L. REV. 163 (1977).

101. 558 F.2d 513 (9th Cir. 1977).

102. The defendant was charged with certain crimes relating to hashish. When arrested he had a "coke" spoon around his neck. At trial, he denied on cross-examination any knowledge that the "coke" spoon is commonly used to sniff cocaine. *Id* at 514–16.

103. The government produced testimony that several months before the defendant had sold a large amount of cocaine to an undercover agent. No conviction resulted, however, because of an illegal search and seizure. *Id.* at 516.

104. Federal Evidence Rule 608(b) in pertinent part provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence."

105. 558 F.2d at 517.

106. Federal Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

107. 558 F.2d at 517.

ignore a rule of evidence, even one that Congress chose to make mandatory, if he believes that the whole "truth" as he perceived it, might not be served.

The result reached in *Batts* is not so startling as the reasoning suggesting that the Federal Rules of Evidence are to be followed at trial only so long as the judge believes that the evidence presented to the jury accurately reflects the judge's perception of what is the true state of affairs. It is important to note, as a measure of the breadth of the trial judge's discretion under this view, that when the court of appeals licensed the trial judge to suspend the Federal Rule in the service of truth, it neither held nor suggested that suspension of the Federal Rules of Evidence reinstates the common law rule on the issue. The trial judge's pursuit of truth is thus utterly without guide or rule, except for the subjective beacon of truth itself.

Rule 102 is not the only rule with so broad an application. As noted above, Rule 403 cuts across the entire body of evidence rules by empowering the trial judge to exclude evidence that is otherwise entirely relevant, material, and competent if he feels, for example, that the evidence might mislead the jury or that hearing the evidence would waste time.[108] Rules that grant a trial judge broad license to depart from established evidence principles whenever his sense of justice, or some equally vague urge, so moves him are often tantamount to having no rules at all. These broad discretionary exceptions introduced in the Federal Rules are carried into the proposed Ohio Rules of Evidence and constitute the most disturbing feature of both.

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108. Potential abuse of this broad power has been noted. Professor Dolan observed that: "Criticism has been leveled at the prejudice rule because the trial judge has tremendous discretionary power to shape the factfinder's decision so that it will harmonize with the judge's perceptions of a 'correct' result." Dolan, *supra* note 94, at 227. *See also* text accompanying notes 93–94 *supra*. The problems raised by proposed Ohio Evidence Rule 403 were raised decades ago by critics of the Model Code of Evidence which contained a provision similar to Rule 403. Judge Van Voorhis of the New York Court of Appeals observed:

> I do maintain that it would require a very unusual trial judge indeed to be able to apply many of the provisions of this Code where an arbitrary discretion is confided to the trial judge without any standards which he is to follow in the rendering of a decision. It seems to me that to permit a trial judge in his discretion to exclude evidence if he finds that its probative value is outweighed by the risks and its admission will necessitate undue consumption of time is a dangerous provision. . . . I certainly do not think that the judge should have the power to exclude evidence if he finds that its probative value will necessitate undue consumption of time . . . I say frankly I have known judges who would close the case and go fishing . . . I wonder if it be realized that under this proposed Code every judge would have a different view, no matter how able, concerning . . . how much probative value evidence must have to justify consuming the time of the court. . . .

19 Amer. Law Inst. Proceedings 220–21 (1942), *quoted in* 1 J. WEINSTEIN, EVIDENCE ¶ 403[02] (1976).

The troublesome nature of these broad discretionary rules can best be demonstrated by considering proposed Ohio Evidence Rule 803(24). Article VIII of the proposed Ohio Rules[109] sets forth the rules pertaining to hearsay. Rule 802 categorically prohibits the introduction of hearsay evidence.[110] Rule 803, however, lists twenty-four exceptions that permit the introduction of hearsay evidence regardless of its hearsay quality or the availability of the out-of-court declarant. The first twenty-three exceptions more or less reflect the generally recognized common law exceptions to the hearsay rule.[111] For example, Rule 803(1) attempts to codify the "present sense impression" exception to the hearsay rule recognized at common law.[112] Rule 803(24)

109. Article VIII was one of the most controversial features of the Federal Rules of Evidence and it significantly liberalized the common law hearsay rule. Despite voluminous commentary one collateral effect of broader hearsay exceptions has received relatively little attention: the burden placed on the opponent when hearsay is more freely admitted. Very often, if not generally, the proponent of hearsay evidence is the party with the burden of persuasion on the issue to which the hearsay is relevant. Whenever hearsay evidence is admitted, however, the proponent of the evidence is relieved of the ordinary burden of producing the declarant in court. That is the very purpose of the hearsay exceptions. Thus, broader exceptions to the hearsay rule make it easier for the proponent to establish his case. Of course, this has the complimentary effect of increasing the burden on the adverse party. Whenever hearsay is admitted, the burden shifts to the opponent to search out and produce the "invisible witness," in order to preserve his right to inquire into the declarant's ability to perceive, his memory, his credibility, prior inconsistent statements and other matters that the party against whom the hearsay is offered would be entitled to explore if the witness were produced. The result of permitting greater use of hearsay is ironic, for as a practical matter it places the burden of producing a witness on the party against whom the witness has evidence. Thus, freer use of hearsay places adverse counsel in an ever more frequent dilemma: either he produces the witness who has evidence against his client's interest, or he gives up the opportunity to inquire of the witness and thus the opportunity to limit the effect of his damaging hearsay testimony. Professor Rothstein has perceptively suggested these effects of freer admissibility of hearsay. *See* Rothstein, *supra* note 94, at 26–27.

110. Ohio Evidence Rule 802 provides:

> Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by Act of Congress, by statute enacted by the General Assembly not in conflict with an existing rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

111. *See generally*, Blackmore, *Some Things About Hearsay: Article VIII*, 6 CAP U.L. REV. 597, 606–22 (1977).

112. Under the present sense impression exception, if A, while witnessing an accident, states that X ignored the red light, witness B can testify at a trial that A said that X ran the red light. It makes no difference that A himself may be present and fully capable of testifying to his observations. So long as A made the out-of-court statement while perceiving the event, anyone hearing the statement may relate it in court for the truth of the matter asserted.

Criticism has already been leveled at Federal Evidence Rule 803(1) in that, as written, it is capable of an interpretation that would widely depart from the common law exception. *See* Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?*, 2 LITIGATION 22, 23–24 (1975). Professor Waltz concludes

adds, however, a new exception to the hearsay rule. It provides that evidence may be admitted even though it is hearsay and even though it does not fall within any of the twenty-three generally recognized exceptions to the hearsay rule. The trial judge is given discretion to admit any hearsay if he determines that the hearsay has "circumstantial guarantees of trustworthiness" equivalent to the first twenty-three exceptions, and if he determines that the interests of justice require admission of the hearsay evidence.[113] This type of nonspecific exception licensing the trial judge to deviate from the hearsay rule and its exceptions has never been recognized as a part of the evidence law of Ohio.[114]

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that Rule 803(1) is "an awesomely elastic exception to the rule against hearsay." *Id.* at 24. Indeed, Josiah Blackmore, an Evidence Rules Advisory Committee Staff member, has cautioned that the Rule as proposed in Ohio, while useful, requires further analysis of its potential operation and use. Blackmore, *supra* note 111, at 607–08.

113. Proposed Ohio Evidence Rule 803(24) requires also that the hearsay evidence be of a material fact and that it be more probative than any other evidence that the proponent could reasonably be expected to obtain.

114. The authors have found no case authority in Ohio that recognizes a trial judge's discretion to fashion his own exceptions to the hearsay rule to fit his individual sense of what justice requires in the case before him. In addition, Professor Weinstein characterized Rules 803(24) and 803(B)(6) as "the most notable changes from prior Ohio practice." Weinstein, *The Ohio and Federal Rules of Evidence*, 6 CAP. U.L. REV. 517, 528–29 n.35 (1977). *But see* Erion v. Timken Co., 52 Ohio App. 2d 123, 130–31 (1977), where the court observed that proposed Ohio Evidence Rules 803(24) and 804(B)(6) merely formalize "the Ohio rule for this particular matter of hearsay." The court did not characterize the nature of "this particular matter of hearsay," so the reader is left to speculate for himself what specific kinds of hearsay the court felt Ohio law relegates to the discretionary power of Ohio trial judges. Nor did the court cite any authority for its conclusion that the discretion contained in proposed Ohio Rules 803(24) and 804(B)(6) reflects "the Ohio rule." None exists.

In fact, the Supreme Court of Ohio has noted its disapproval of creating discretion on issues that are capable of resolution by legal principles. *See* American Guar. Co. v. McNiece, 111 Ohio St. 532, 146 N.E. 77 (1924), where the court stated:

> We have no patience with any theory which would permit each separate case of a class which may be determined by the same general principles to become *sui generis*, for the reason that the doctrine *sui generis* tends to supplant the fundamental principle that rights and liabilities are such by law rather than by the conscience of the particular tribunal who may be called upon to determine them.

Id. at 547, 146 N.E. at 81.

Those who have searched in other jurisdictions have also concluded that a discretionary hearsay exception is unprecedented. *E.g.*, Hughes, Horwitz, Koenig, Shields & Wolfe, *Comparison of the New Federal Rules of Evidence and Rules of Evidence Applied in Massachusetts Courts*, 60 MASS. L.Q. 125, 158 (1975) (the authors conclude that: "[t]here is no Massachusetts counterpart to this newly-created and broadly inclusive federal exception to the hearsay rule"); Robinson, *The Impact of Federal Rules of Evidence on Michigan Evidence Law*, 54 MICH. ST. B.J. 193, 203 (1975) (the author concludes that although a few cases have "interpreted existing hearsay exceptions to justify admission of certain questionable extra-judicial statements," there "is no Michigan law equivalent to Federal Rules 803(24) and 804(b)(5)"); Tait, *The New Federal*

Several aspects of Rule 803(24) concern the Attorney General's Office. The first is the language of the Rule itself, for it is limited only by the standard of equivalent trustworthiness. The very presence of a broad, open-ended, catchall exception to the hearsay rule has the potential for reducing the other twenty-three specifically worded exceptions in Rule 803 to so many general, directory principles which the trial judge is free to follow or not according to his own sense of justice.

Each of the twenty-three exceptions to the hearsay rule listed in 803(1) to 803(23) has within it limitations on its scope and operation. For example, Rule 803(8)[115] allows into evidence hearsay in the form of governmental reports to prove the truth of the matters contained in them, provided that police reports can be introduced in a criminal trial only by a defendant and not by the prosecution. Rule 803(22)[116] admits evidence of prior convictions only if the crime was a felony. Rule 803(24), however, threatens to reduce exceptions such as these to mere suggestions because it allows a judge to admit, through the catchall exception, hearsay that does not fit the limitations in the other twenty-three specifically worded exceptions. For example, must a judge necessarily exclude evidence of a misdemeanor conviction? Must the

Rules of Evidence: A Summary of the Differences Between the Rules and the Connecticut Law of Evidence, 9 CONN. L. REV. 1, 34 (1976) (the author observes that: "Connecticut has never overtly recognized such a residual exception"); Wendorf, *Should Texas Adopt the Federal Rules of Evidence?*, 28 BAYLOR L. REV. 249, 274 (1976) (the author concludes there is no precedent in Texas for such a rule); Note, *Symposium on the Federal Rules of Evidence: Their Effect on Wyoming Practice if Adopted*, 12 LAND AND WATER REV. 601, 708 (1977) (the author concludes that there is no similar rule in Wyoming); *cf.* Comment, *A Practitioner's Guide to the Federal Rules of Evidence*, 10 U. RICH. L. REV. 169, 193 (1976) (Virginia adheres to the strict common law hearsay rule and its exceptions).

115. Proposed Ohio Evidence Rule 803(8) provides for this exception to the hearsay rule:

> Records, reports, statements, or data compilations in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, or (c) factual findings resulting from an investigation made pursuant to authority granted by law, in civil actions and proceedings and against the state or political subdivision thereof in criminal cases unless the sources of information or other circumstances indicate lack of trustworthiness. Factual findings shall not include either opinions or evaluations not otherwise admissible.

116. Proposed Ohio Evidence Rule 803(22) provides for this exception to the hearsay rule:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

trial judge necessarily exclude a police report offered by the prosecution? Rules 803(22) and 803(8) on their face clearly prohibit the introduction of such evidence. But it would seem that either piece of evidence could be admitted under Rule 803(24). Assume that the criteria of materiality and absence of a better source for the evidence are met. The two other standards the trial judge is to apply in considering hearsay evidence offered under Rule 803(24) are, first, "equivalent circumstantial guarantees of trustworthiness" and, second, his own sense of what justice requires. With respect to the first standard, a misdemeanor conviction has no fewer circumstantial guarantees of trustworthiness than a felony conviction. Nor does a police report have fewer circumstantial guarantees of trustworthiness when offered by the prosecution than when offered by the defense. As for the second standard, a particular judge's sense of justice is wholly subjective and not a specific or meaningful restriction on the potential scope or use of Rule 803(24). Thus, nothing in the proposed Ohio Rules of Evidence suggests that Rule 803(24) should not be so used to circumvent the limitations in the specific exceptions to the hearsay rule. Indeed, use of Federal Rule 803(24) in this way has already been advocated.[117]

Not only does Rule 803(24) potentially eliminate what limitations

117. *See, e.g.*, Comment, *The Admissibility of Police Reports Under the Federal Rules of Evidence*, 71 NW. U.L. REV. 691, 700 (1977); *cf.* Keyes v. School Dist. No. 1 Denver Colo., 439 F. Supp. 393, 411 (D. Colo. 1977) (court approved use of 803(24) to circumvent the limitations of 803(6)). *But see* United States v. Oates, 560 F.2d 45 (2d Cir. 1977), where the court demonstrated that Congress simply could not have intended rule 803(24) to be used so broadly.

By contrast, a somewhat more expansive view of Federal Rule 803(24) was expressed in United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977), which was decided between the time of argument and decision in *Oates*. The court was presented with the argument that Congress did not intend Federal Rule 803(24) to be used except in the most exceptional circumstances, and it rejected the reference to congressional intent, noting that the rules themselves do not express any such limitation. The court even implied that such a limitation makes no practical sense because of the inherent vagueness of a concept of "exceptional circumstances." *Id.* at 866. The trial judge in *American Cyanamid*, refusing to be bound by either the Advisory Notes or the legislative history, stated that:

> Neither the Rule, nor the cases in this Circuit interpreting the Rule, . . . impose any express limitation concerning exceptional cases. To every criminal defendant, his own case is exceptional. Rule 803(24) establishes sufficient express criteria which must be satisfied before an item of hearsay will be admissible. . . . There is no requirement that the court find a case to be "exceptional," whatever that means, in order to receive any evidence. To imply such a provision, as suggested by the Judicial Committee, . . . would negate the requirement of Rule 102, F.R. Evid. that "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Id. at 865–66.

there are in the specific Rule 803 exceptions to the hearsay rule, but it may also reach beyond Rule 803 and negate other express limitations on the use of hearsay evidence.[118] Ohio Evidence Rule 801(D)(1), for example, provides that prior inconsistent statements by a witness who testifies at trial may be introduced for the truth of the matter asserted in the prior out-of-court statement if the prior inconsistent statement was given "under oath . . . at a trial, hearing, or other proceeding,[119] or in a deposition."[120] In *United States v. Leslie*,[121] the Fifth Circuit, interpreting Federal Rule 801(d)(1), held that a prior inconsistent statement that could not be admitted under Rule 801(d)(1) because it was not a statement under oath may nevertheless be admitted under the catchall terms of Rule 803(24).[122]

A hearsay rule that has as broad an exception as Rule 803(24) is virtually no rule at all, for under such a broad exception fits any piece of hearsay that a trial judge feels has "circumstantial guarantees of trustworthiness." The license given trial judges by so vague a standard caused the Supreme Court of Maine to eliminate Rule 803(24) entirely from the Maine Rules of Evidence considering it "a guideline which the most conscientious of judges would find difficult to follow."[123]

118. It has been suggested that the presence of Federal Rule 803(24) renders Federal Rule 804(b)(5), the other hearsay catchall exception, wholly superfluous. J. WALTZ, THE NEW FEDERAL RULES OF EVIDENCE 171 (2d ed. 1975). The author observes that any hearsay that might be admissible under Federal Rule 804(b)(5) is also admissible under Federal Rule 803(24). That analysis is logically valid. Rule 804 lists hearsay exceptions for situations where the declarant is unavailable, while Rule 803 lists hearsay exceptions that apply *regardless* of the declarant's availability. The latter completely subsumes the condition on which the former becomes operative, so that Rule 804(b)(5) is entirely unnecessary.

119. The potential scope of this phrase is demonstrated by United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976). In that case, three of the government's witnesses testified at trial favorably to the accused. The government then impeached its own witnesses under authority of Federal Rule 607 by introducing as nonhearsay, and thus for the truth of the matter asserted, their prior inconsistent statements made at an immigration investigation. The court of appeals affirmed the substantive use of the prior statements, holding that such an interrogation conducted by a border patrol agent was an "other proceeding" encompassed by Federal Rule 801(d)(1).

120. Under Federal Rule 801(d)(1) the prior inconsistent statements in *Castro-Ayon* were admitted to prove the content of the prior statement, not just to test the witness' credibility. This is a change in existing law for presently the prior out-of-court statement is hearsay and may be admitted for the limited purpose of testing the witness' credibility. *See* Mills v. State, 104 Ohio St. 202, 203–05, 135 N.E. 527, 528 (1922); Mahoning Nat'l Bank v. Massachusetts Mut. Life Ins. Co., 28 Ohio L. Abs. 619, 625 (Ct. App. 1939). For a recent criticism of Federal Rule 801(d)(1)(A), see Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565, 1568–93 (1977).

121. 542 F.2d 285 (5th Cir. 1976).

122. *Id.* at 289–91.

123. 4 J. WEINSTEIN, EVIDENCE 803-250, at 88–89 (Dec. 1977 Supp.).

> The Court decided not to adopt any catch-all provision. . . . It concluded . . . that despite the purported safeguards, there was a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be lack of uniformity which would make preparation for trial difficult. Nor would it be likely that the Law Court on appeal could effectively apply corrective measures. There would indeed be doubt whether an affirmance of an admission of evidence under the catch-all provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial judge had abused his discretion.[124]

Cases already decided under Federal Rules 803(24) and 804(b)(5) suggest that federal courts are willing to admit some remarkable hearsay evidence "in the interests of justice." The Eighth Circuit decision in *United States v. Carlson*[125] is illustrative.

In *Carlson*, three defendants were charged with various drug offenses. A witness testified before the grand jury but refused to testify at trial, first citing his fifth amendment privilege and then, after being granted immunity, alleging that he feared for his life. He would not, however, specifically identify the person who caused his fears. Although the witness' grand jury testimony was damaging to two of the three persons indicted, the trial judge concluded that the defendant Carlson was the cause of the witness' fear. The trial court admitted the witness' grand jury testimony, which had not been subject to cross-examination, as substantive evidence of the defendant's guilt.[126]

The court of appeals found no error in admitting grand jury testimony on the issue of guilt even though the accused at no time was given the opportunity to confront and cross-examine the witness. The court conceded that "we have not been cited nor have we found any case in which an unavailable witness' grand jury testimony was admitted as substantive evidence at trial to reflect on defendant's guilt."[127] Nor was the hearsay testimony admissible under any of the specific exceptions to the hearsay rule contained in Federal Rules 803 or 804. The only authority relied upon by the court of appeals for the introduction of the uncross-examined grand jury testimony as evidence of guilt was the ad hoc exception contained in Federal Rule 804(b)(5).

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124. *Id.*

125. 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977), *noted in United States v. Carlson: Eighth Circuit Implies Waiver of Accused's Express Confrontation Right*, 22 S.D.L. REV. 447 (1977).

126. 547 F.2d at 1352–53.

127. *Id.* at 1359.

The court of appeals realized that its decision to permit uncross-examined testimony on the issue of guilt might present some problems in light of the constitutional right of confrontation. Although the court observed that the "contours of the confrontation clause" of the sixth amendment to the United States Constitution are not very clear, it declined to consider the constitutional implications of its decision.[128] Rather, the court noted that "[a]t the outset we accept, based upon the District Court's findings and the evidence adduced at the trial court proceedings, that [the witness] refused to testify because of threats directed against him by Carlson."[129] From there, the court of appeals reasoned that whatever the sixth amendment implications may be in allowing the use of uncross-examined testimony to convict, Carlson waived any objection he may have had when he was found to have threatened the witness.

The *Carlson* court noted that "[s]anctioning the use of grand jury testimony under these circumstances at trial may have wide ramifications in the criminal justice system."[130] But the ramifications of *Carlson* are not limited to criminal cases; the court's use of the catch-all hearsay exception to allow introduction of unprecedented hearsay is equally applicable to civil cases. Consider as an example an accident case in Ohio witnessed by an out-of-state resident. Assume counsel sends an adjuster or investigator who takes a completely noncollusive, sworn statement from the witness. Even if the witness is discovered before trial, he may not be deposed, especially if the witness appears to have only cumulative evidence. If the witness is subpoenaed to testify at trial but, for whatever reason, chooses to ignore the subpoena (something an out-of-state resident is entirely free to do), the situation is essentially the same as that presented in *Carlson*. Using *Carlson* as precedent the trial judge in his discretion[131] may admit the absent witness' sworn statement if the judge finds "circumstantial guarantees of trustworthiness" for the statement. The only way to distinguish the hypothetical civil case from the *Carlson* situation is to maintain that the testimony given before a grand jury is inherently more trustworthy than testimony given to a notary public. The Attorney General's Office can find neither comfort nor substance in that distinction.

The implications of *Carlson* and the open-ended hearsay exceptions are profound. Practicing trial lawyers and trial judges have

128. *Id.*

129. *Id.* at 1353.

130. *Id.* at 1357.

131. The court in *Carlson* observed that a trial court in applying the hearsay catchall exception "has a wide latitude of discretion in determining the trustworthiness of a statement." *Id.* at 1354.

proceeded for years on the general premise that if one is to prove his case, one had better have his witnesses in court prepared to testify. Rule 803(24) makes it possible to establish a case without subjecting witnesses to cross-examination in infinitely more situations than the comparatively few and narrow instances recognized in the common law hearsay exceptions. An open-ended exception such as 803(24) invites imaginative lawyers to mold circumstances so that evidence gets in but the rigors of cross-examination are avoided. Moreover, a catchall exception to the hearsay rule encourages the filing of cases that finite, narrowly drawn exceptions would preclude, on the hope that a judge will be moved by his personal sense of justice to admit hearsay that the common law would have excluded. It may also prompt a lawyer to file a case based on such hearsay evidence simply to coerce a settlement, playing on his opponent's fear that a judge *might* admit the hearsay. Proposed Ohio Rule 803(24) and 804(B)(6) are open invitations to lawyers to increase the use of uncross-examined testimony "in the interest of justice."[132]

The Attorney General's deeper concern with Rule 803(24) is that it virtually eliminates the hearsay rule as a rule of law.[133] The common law hearsay rule, together with its exceptions, is a rule of law in Ohio.[134] Because the trial court in ruling on hearsay issues rules as a matter of law, a reviewing court is entitled to substitute its judgment on

132. For a discussion of some of the collateral effects of increased use of hearsay testimony, see note 109 *supra*.

133. In addition, the proposed expansion of the hearsay exceptions as applicable to criminal cases may be unconstitutional in Ohio. The Ohio Constitution provides: "[I]n any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face." OHIO CONST. art. I, § 10. Less than five years after the reiteration of that provision in the revised Constitution of 1851, the Supreme Court of Ohio considered its meaning and operation. In Summons v. State, 5 Ohio St. 325 (1856), the court stated:

> This, like numerous other provisions in the bill of rights, is a constitutional guaranty of one of the great fundamental principles well established, and long recognized at common law, both in England and in this country. The scope and operation of it are clearly defined and well understood, in the common law recognition of it; and the assertion of it in the fundamental law of the State, was designed neither to enlarge nor curtail it in its operation, but to give it permanency, and *secure it against the power of change or innovation*.

Id. at 340 (emphasis added). Yet, the residual hearsay provisions of the Federal Rules of Evidence "[open] the door to a whole new world of hearsay exceptions and permit the development of the hearsay rule in the future *through judicial enlargement*. This exception [Rule 803(24)] and Rule 804(b)(5) confer broad discretion to create exceptions to the hearsay rule based on trustworthiness." Wood, *The Federal Rules of Evidence*, 38 TEX. B.J. 535, 539 (1975) (emphasis added). The Modern Courts Amendment, OHIO CONST. art. IV, § 5, as broad as it is, does not give the supreme court authority to draft rules that would repeal portions of the constitution inconsistent with the court's rules.

134. *See* Ferrebee v. Boggs, 24 Ohio App. 2d 18, 263 N.E.2d 574 (1970); Mikula v. Balogh, 9 Ohio App. 2d 250, 224 N.E.2d 148 (1965).

the matter if it disagrees with the trial judge's ruling.[135] Under Rule 803(24), a ruling on a hearsay question is a matter of discretion.[136] As such it is reviewable, if at all, only if it can be demonstrated that the trial judge plainly and manifestly abused his discretion to such a degree as to affect a substantial right of the appellant.[137] Under that standard of review the court of appeals cannot reverse, even if it disagrees with the trial court's decision, without finding a clear abuse of discretion.[138] By vesting broad discretionary authority in the trial judge to create ad hoc hearsay exceptions, the proposed Ohio Rules of Evidence essentially remove any meaningful opportunity for review.[139] The Attorney General's Office submits that this is too major and fundamental a

135. The standard of review on hearsay rulings in Ohio has consistently been a two-step analysis: (a) did the trial court err in its application of the law, and (b) was it possibly prejudicial to the objecting party. *See, e.g.*, Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp., 42 Ohio St. 2d 122, 131, 326 N.E.2d 651, 658 (1975); Hallworth v. Republic Steel Corp., 153 Ohio St. 349, 353–59, 91 N.E.2d 690, 693–95 (1950). *See* Cowan v. Kinney, 33 Ohio St. 422 (1878); James Wilson & Co. v. Barklow, 11 Ohio St. 470 (1860); State v. Young, 7 Ohio App. 2d 194, 220 N.E.2d 146 (1966); Lindsay v. Baltimore & Ohio R. Co., 98 Ohio App. 63, 128 N.E.2d 242 (1954); Ludy v. Ludy, 84 Ohio App. 195, 82 N.E.2d 775 (1948); Farmers Nat'l Bank v. Frazier, 13 Ohio App. 245 (1920); North Amherst Home Tel. Co. v. Jackson, 4 Ohio C.C. (n.s.) 386 (1903). Nowhere in Ohio law is it recognized that a trial judge has discretion to fashion his exceptions to the law of hearsay to fit his own sense of what justice requires in the case before him. The common law hearsay rule and the exceptions to it are not matters which the trial judge is free to apply or not as he sees fit.

136. For a description of the latitude that Federal Rule 803(24) gives to the trial judge, see Wood, *supra* note 133. *See also* Blackmore, *supra* note 111, at 616.

137. The difficulty in obtaining appellate review on evidentiary rulings, once they are conceded to be within the trial judge's discretion, was demonstrated recently in United States v. Robinson, 560 F.2d 507 (2d Cir. 1977), where the court, when asked to review an evidentiary ruling, stated: "[T]he preferable rule is to uphold the trial judge's exercise of discretion unless he acts *arbitrarily or irrationally*." *Id.* at 515 (emphasis added).

138. Where . . . discretion exists, neither party may successfully urge before an appellate tribunal that he is entitled to an opposite or different decision, or to a "correct" decision. . . . Even if the appellate tribunal concedes that by its lights the wrong decision has been made . . . it will not reverse. A trial court determination that is discretionary. . . has a status or authority that makes it either unchallengeable, or challengeable to only a restricted degree.

Rosenberg, *supra* note 100, at 641 (footnote omitted). *See* Napolitano v. Compania Sud Americana deVapores, 421 F.2d 382, 384 (2d Cir. 1970), where the court refused to find abuse of discretion although they would have had no hesitancy in reaching an opposite decision from that of the trial judge. *Accord*, Construction Ltd. v.Brooks-Skinner Bldg. Co., 488 F.2d 427 (3d Cir. 1973).

139. The broad discretion under the proposed Rules parallels that of the Federal Rules. Accordingly, the comments of Professor Richard H. Field, who has been an active and prolific advocate of the Federal Rules of Evidence, are pertinent: "Appellate judges are reluctant to find an abuse of discretion from a cold record. Hence the exercise of discretion is often as a practical matter unreviewable. The thrust of the Federal Rules is to enlarge that area of discretion. . . ." Field, *A Code of Evidence for Arkansas?*, 29 ARK. L. REV. 1, 5 (1975).

change in Ohio's law of appeal, especially since it appears that neither the supreme court nor its Evidence Rules Advisory Committee gave full consideration to this collateral effect of introducing discretion into the law of hearsay.[140]

The discretion exemplified by Rule 803(24)[141] permeates the entire set of proposed rules, especially Rules 403[142] and 102 as interpreted in *United States v. Batts*.[143] More is lost, however, through broad grants of discretion than merely the right of appellate review. When the basis for evidentiary decisions is openly acknowledged to be whatever the trial judge thinks is right and just, litigants lose the benefit of what self-restraint and circumspection judges normally exercise when they know that at some point their decisions on critical evidentiary matters might be tested against precedent.[144] Indeed, reliance upon precedent is the

140. Professor Josiah H. Blackmore, a staff member appointed by the supreme court to assist the Committee, has noted that the issue of appealability of discretionary evidentiary matters is in need of further analysis. Blackmore, *supra* note 111, at 616.

141. The Supreme Judicial Court of Maine, in its adaptation of the Federal Rules, refused to adopt Rules 803(24) and 804(b)(5). Professor Field reports that the Maine Supreme Court rejected the catchall clauses because the court "feared that discretion would be exercised by trial judges in widely different ways and thus create a degree of unpredictability which would make preparation for trial unduly difficult. . . . The Maine Court was unimpressed by [the] purported safeguards and preferred to eliminate the sections." Field, *Maine Rules of Evidence: What They Are and How They Got That Way*, 26 MAINE L. REV. 203, 223 (1975). Professor Field, although a strong supporter of the Rules, observed that: "There is strong practical justification for the Court's decision. . . ." *Id.* The reaction of the Maine Supreme Judicial Court appears to have been more emphatic than reported by Professor Field. *See* text accompanying notes 123–24 *supra*.

142. Rule 403 allows the exclusion of relevant evidence for prejudice, confusion, or waste of time. It is perhaps the broadest express grant of discretion in the proposed rules. If Rule 803(24) eliminates hearsay as a rule of law, Rule 403 effects the same change for the entire body of evidence law. *See* Rothstein, *supra* note 94, at 29.

143. 558 F.2d 513 (9th Cir. 1977), discussed in text accompanying note 101 *supra*.

144. Former Solicitor General of the United States, Simon E. Sobeloff, made the same observation in urging the need for appellate review of criminal sentencing. He argued that appellate review is needed not only because it provides a means for the judicial process to rectify internally its own mistakes, but also because review would have "a sobering and moderating effect [on the trial judge]. . . . The possibility of review would make itself felt even in cases not actually appealed. The existence of the power [of appellate review] would make its exercise unnecessary in all but a few cases." Sobeloff, *The Sentence of the Court—Should There be Appellate Review?*, 41 A.B.A.J. 13, 17 (1955).

Benjamin Cardozo also noted the profound effect that the mere availability of review indirectly exerts. Writing about judicial review of legislation, he stated:

> The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, [and] the scorn and derision of those who have no patience with general principles. . . . By conscious or subconscious influence, the presence of this restraining power, aloof

very source of a lawyer's legitimate control over trial court decisions.[145] If the trial judge is obligated to follow a rule of law, counsel can control or influence the decision by persuading the trial judge that a particular proposition is the applicable rule of law. Substitute the judge's personal quest for "justice" in place of his obligation to discern and follow controlling precedent, as the proposed Ohio Rules of Evidence do, and this source of influence and control is lost.

The profound effects of expanded discretion cannot be minimized. Expansion of discretion necessarily implies that the rule of law does not control and thus constitutes an assault upon the very legitimacy of the judicial process. The rule of law is not a mystical thing.[146] It essentially assures that whenever a particular set of circumstances or conditions exists, a particular result will obtain. It is founded upon the unspoken premise of the common law tradition—consistency. In the words of Lord Mansfield, "[w]e must act alike in all cases of like nature."[147] The legitimacy of the judicial process in large part is founded upon its commitment to decide similar cases similarly,[148] and the rule of law is merely the method of pursuing that goal.[149] Our common law judicial process is committed both to that consistency among decisions and to the improvement of precedent through the process of repeated reasoned application and distinction. Discretion, however, is the very antithesis of the rule of law because it eliminates virtually all barriers to a judge deciding similar cases *differently*.[150]

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in the background, but none the less always in reserve tends to stabilize and rationalize the . . . judgment.

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92–93 (1921).

145. For whereas the court might make records and keep them, but yet pay small attention to them, or might pay desultory attention, or might even deliberately neglect an inconvenient record if they should later change their minds about that type of case, the lawyer searches the records for convenient cases to support his point, presses upon the court what it has already done before, capitalizes the human drive toward repetition.

K. LLEWELLYN, THE BRAMBLE BUSH 65 (1930).

146. *See id.* at 65.

147. *Quoted in* Ward v. James, [1966] 1 Q.B. 273, 294.

148. "It is the essence of all law that when the facts are the same the result is the same." Hubbard v. Hubbard, 77 Vt. 73, 77, 58 A. 969, 970 (1904).

149. It will not do to decide the same question one way between one set of litigants and the opposite way between another.

. . . .

Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the evenhanded administration of justice in the courts.

B. CARDOZO, *supra* note 144, at 33–34.

150. To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another. In this sense, the term suggests that there is no wrong answer to the questions posed—at least, there is no *officially* wrong answer.

Rosenberg, *supra* note 100, at 636–37 (emphasis original).

Indeed, discretion encourages inconsistency because it absolves the trial judge of any responsibility to articulate or even formulate in his own mind the precise reasons for his decision. Discretion instructs the judge to announce the result he wants or thinks just, not the result that the rule of law, through its centuries of evolution and development, teaches is the appropriate result for those conditions and circumstances.

Other consequences of discretionary rules of evidence are equally troublesome. Professor Wigmore strongly condemned the concept of discretionary rules of evidence, and the opposition of the Attorney General's Office to the proposed Rules parallels Professor Wigmore's criticism. Professor Wigmore warned that when vast discretion is handed to the trial judge on evidentiary matters, predictability of decisions is necessarily lost, and uncertainty in litigation is increased.[151] Because discretion allows the trial judge to base his evidentiary rulings on personal notions of justice, counsel can no longer rely upon the fact that a certain form of evidence consistently has been admitted or consistently excluded. The trial judge is free to depart from the traditional resolution of an issue with full assurance that, absent a clear abuse of discretion affecting a substantial right of a party, no higher court is going to substitute its judgment even if the higher court disagrees with the ruling.

The fundamental error in the reasoning which seeks to expand discretion under the evidentiary rules is that it rests on too narrow a view of the function that the law of evidence performs in the legal process. If the rules of evidence had significance only in the courtroom, flexibility should prevail over certainty to insure that all reliable evidence is put before the jury. Indeed, the Federal Rules were drafted on that very premise. The law of evidence, however, has a far broader role in the legal process than just courtroom application. Well over eighty-five percent of all cases are settled out of court.[152] Untold

151. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A.J. 23, 24 (1942). Speaking about the development of judicial precedent when the standard of appellate review is manifest abuse of discretion, Professor Wigmore wrote:

> But . . . what has the appellate court got to go upon? Not the misapplication of a rule, for no rule has been declared. It has only the offer, the record, and the ruling. Thus the uncertainty of practice is merely relegated to the appellate court; and the Bar is no better off next time than before, in preparing for trials. . . . [I]s it not probable that in these proposed large areas of "discretion" the Law of Evidence will suffer, not a re-form, but a relapse into that primal condition of chaos, described in Genesis 1:2, when the Earth "was without form and void"?

Id.

152. *Cf.* Fuchsberg, *Realistic Settlement Techniques*, 1 TRIAL L.Q. 367 (1964) (over 95% of personal injury cases are settled out of court); Groce, *Personal Injury Cases:*

numbers of cases are never filed as legal actions at all. One reason cases are settled out of court or are never filed at all is that lawyers have some ability to assess the strength and value of their cases. They are able, to some extent, to determine on what issues they are likely to prevail because they are able to ascertain to some degree what the evidence on those issues will be.[153] Rules of evidence thus play a major role in resolving disputes outside the four walls of the courtroom and in filtering cases out of the judicial process. Predictability is central to this role. When the admissibility of evidence turns on the personal sense of justice of the trial judge, fewer cases can be settled without litigation, and this larger function of evidence law is necessarily lost.[154]

The drafters of the Federal Rules of Evidence made a considered decision when they included broad discretionary rules. They believed that discretion had to be incorporated into the Federal Rules in order to allow for continued development in the law of evidence. They feared that nondiscretionary evidence rules would preclude further growth.[155] This article demonstrates, however, that broad discretionary rules of evidence supplant the rule of law. When discretion is the recognized standard a judge is to apply on evidentiary issues, several changes occur. First, the right of appeal on evidentiary matters is all but lost.[156] Lost also are the restraints that a judge feels when he knows that he is to follow a rule of law rather than intuitive notions of "right" or "justice." Predictability too is lost when judges are free to decide

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Reaching Reasonable Settlements Before Trial and Minimizing Recovery at Trial, 20 ARK. L. REV. 18 (1966) (98% of claims arising out of automobile accidents are settled). Although these articles present statistics from other jurisdictions, there is no reason to believe that Ohio's statistics would be significantly different.

153. Spangenberg, *The Federal Rules of Evidence—Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061, 1071 (1969).

154. This, of course, says nothing about the increased burdens upon the courts when evidence matters are decided on a case-by-case basis rather than by adherence to precedent. Cardozo noted that:

> [T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. . . . The situation would . . . be intolerable if . . . changes in the composition of the court were accompanied by changes in its rulings.

B. CARDOZO, *supra* note 144, at 149–50.

155. *See* Berger, *An Introduction to the Federal Rules of Evidence*, 2 LITIGATION 8 (1975). *See generally*, Spangenburg, note 153 *supra*; Weinstein, note 114 *supra*.

156. Judge Weinstein believes that, under the proposed Rules, the role of the appellate courts is to examine evidentiary rulings of trial judges only in "cases of egregious error." In fact, according to Judge Weinstein: "Lawyers can expect the terms 'discretion' and 'harmless error' to blunt all but the most powerful attacks on the most serious evidence errors." Weinstein, *supra* note 114, at 528.

evidence questions based on their own sense of justice rather than according to precedent or accepted principles of law.

Expressly injecting discretion into rules of evidence in order to preserve flexibility and potential for growth changes also a fundamental feature of our judicial process. Under the common law, unless a matter is recognized to be within the trial judge's discretion, such as the order of evidence or form of questions, the trial judge is constrained to apply the law as he finds it.[157] On legal matters, his ruling is either right or wrong. Flexibility, of course, is essential to the growth of the law, but the common law does not recognize it at the trial court level. The power and right to fashion developments in the law are reserved to reviewing courts, courts that are removed from the heat, emotion, and public pressures of trial practice, courts whose formal pronouncements on the current state of the law are effective across the jurisdiction. Change in the law under this system occurs when a trial judge either misreads existing law but is affirmed on appeal, or when the trial judge anticipates change and knowingly rules contrary to existing law.[158]

The proposed Ohio Rules of Evidence would change all of this. They would, under the rubric of discretion, take the power to change the law that now rests in the Supreme Court of Ohio and, perhaps, in the ten courts of appeals, and would place in the hands of over five hundred state trial court judges the right and power to fashion case-by-case changes in the law of evidence.[159] The trial judges would become the legitimate draftsmen of their own evidentiary innovations. Because the decisions of these judges are discretionary, the case-by-case innovations are all but unreviewable by higher courts.[160] Moreover, trial judges rarely express the basis for their evidentiary rulings and even less frequently do they author written opinions on these rulings. The result is that trial judges are free to wander on evidence questions as widely as each judge's sense of justice may carry him, without either the restraint of appellate review or the guidance of precedent. It is hard to understand how consistency or uniformity on evidentiary rulings can be achieved under these circumstances.

157. That a trial judge is bound to apply the law as he finds it is a long-established tenet of this jurisdiction. *See, e.g.*, Skelly v. Jefferson Branch of the State Bank, 9 Ohio St. 606, 614–15 (1859), where the court said: "The decision of an appellate court is evidence of law, and in the inferior courts in the nature of conclusive evidence." *See also* In re Shott, 16 Ohio App. 2d 72, 241 N.E.2d 773 (1968); Ford v. Papcke, 26 Ohio App. 225, 158 N.E. 558 (1927).

158. Skelly v. Jefferson Branch of the State Bank, 9 Ohio St. 606, 615 (1859).

159. *Cf.* Blackmore, *Some Things About Hearsay: Article VII*, 6 CAP. U. L. REV. 597, 616 (1977).

160. *See* notes 136–38 *supra* and accompanying text.

It has often been said that trial judges have always exercised discretion under the common law, and what is given them by the proposed Rules is, at most, only slightly more discretion than that which they have always exercised.[161] In other words, so the argument goes, judges have always had discretion and the Ohio Rules of Evidence merely recognize that fact. To be sure, trial judges have always had latitude. But the latitude on questions of law is only that of any free moral agent—the freedom to choose not to follow the law as he understands it. On issues that are considered questions of law, the common law has never recognized this moral freedom to be the trial judge's legal right or power.[162] If the trial judge chooses not to follow the law as he understands it and the court of appeals disagrees, the trial judge is reversed for error. If the court of appeals agrees with him, change results in the law of the jurisdiction.[163] But it is one thing to say that trial judges have always had the freedom not to follow the law as they understand it; it is quite another to say that, because judges have always been free to disregard the law, there should no longer be any law for the trial judge to apply or against which a higher court is to review the trial judge's decision.

The common law allows judges enough flexibility not to retard the growth of the law, but it preserves the opportunity for full legal review, thus maintaining a mechanism for organized systemic change in the law. In short, under the common law, both flexibility and the rule of law are simultaneously maintained.

Codifying the common law rules of evidence necessarily forces a choice between flexibility, on the one hand, and rigid rules of evidence

161. *See* Field, *supra* note 141, at 224.

162. For a discussion of the theory behind the development and use of precedent, see K. LLEWELLYN, *supra* note 145, at 65. Llewellyn goes on to enumerate some of the practical uses of precedent:

> To continue past practices is to provide a new official in his inexperience with the accumulated experience of his predecessors. If he is ignorant, he can learn from them and profit by the knowledge of those who have gone before him. If he is idle he can have their action brought to his attention and profit by their industry. If he is foolish he can profit by their wisdom. If he is biased or corrupt the existence of past practices to compare his action with gives a public check upon his biases and his corruption, limits the frame in which he can indulge them unchallenged. Finally, even though his predecessors may themselves, as they set up the practice, have been idle, ignorant, foolish and biased, yet the knowledge that he will continue what they have done gives a basis from which men may predict the action of the courts; a basis to which they can adjust their expectations and their affairs in advance. To know the law is helpful, even when the law is bad. Hence it is readily understandable that in our system there has grown up first the habit of following precedent, and then the legal norm that precedent is to be followed . . . . [E]ach case must be decided as one instance under a general rule.

Id. at 65–66.

163. Skelly v. Jefferson Branch of the State Bank, 9 Ohio St. 606, 615 (1859).

on the other. The Federal Rules and the proposed Ohio Rules opt for flexibility, which explains the presence of Rules such as 102, 403, and 803(24) that grant broad power to mitigate the effect of other seemingly mandatory or prohibitory rules of evidence. This choice brings with it the problems with discretion discussed above.[164] The sequence is unavoidable: to avoid rigid rules of evidence, one must choose some degree of discretion. To articulate discretion, however, is to alter drastically the relationship between the trial judge and appellate courts under the common law.[165] This dilemma is inherent in codification. Resolution can only be attempted once it is recognized that as desirable as it may seem to have a single corpus of evidence rules, the result will either be excessively rigid or will fundamentally alter the judicial process.

IV. CONCLUSION

It has frequently been stated by those who favor the adoption of the proposed Ohio Rules of Evidence that whatever may be wrong with them, at least lawyers and judges will have in one place a definitive statement of most of the evidence law.[166] Indeed, it is the view of the Supreme Court of Ohio that the proposed Ohio Rules of Evidence will advance uniformity and predictability of decisions.[167] This article has emphasized that, while adoption of a definitive statement of evidentiary rules may be a worthwhile goal, the proposed Ohio Rules of Evidence, quite apart from problems with specific rules, provide for so much judicial discretion that the objective of certainty and uniformity

164. *See* text accompanying notes 136–54 *supra*.

165. Attorney General of the United States Hugh S. Legare, discussing the phenomenon of codification, wrote:

> A rule is [published in a reporter]; if it be inaccurately enunciated you go to the *case* which has settled it. Your remedy is in the report; you detect the error and rectify it; and the precision and uniformity of the law is maintained. But from the moment you *enact* all these rules, they are adopted and promulgated as positive law, and must be interpreted as such. You are to make a great bonfire of your libraries and take a new start. If there is the least change or obscurity in the language, verbal criticism begins, everything that has been settled is afloat once more, and the glorious uncertainty continues until as many more camel loads of reports take the place of the old ones.

Quoted in R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAW MAKING 45 (1898), *quoted in* Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 250 (1967) (emphasis original).

166. *See, e.g.*, Ehrhardt, *A Look at Florida's Proposed Rules of Evidence*, 2 FLA. ST. U.L. REV. 681, 682 (1976), where the author looks to the rules to "ensure uniformity in the application of the rules of evidence in the various courts throughout the state."

167. Chief Justice C. William O'Neill has written: "The Court believes that the Ohio law of evidence will be enhanced with the certainty and uniformity of the rules." O'Neill, *Introduction, Symposium: The Ohio Rules of Evidence*, 6 CAP. U.L. REV. 515, 516 (1977).

is necessarily unachievable. Those goals are incompatible with evidentiary rules that permit the trial judge to do whatever his sense of justice dictates and assure him that no appellate judge will look over his shoulder. In short, certainty and uniformity cannot be achieved where a decision depends not on the law, but on a particular individual's sense of justice; for when you change the man, you change the law.

Appendix A

[Page 1]*

(Ordered Printed by the House)

112th GENERAL ASSEMBLY
REGULAR SESSION,
1977-1978

Am. H. Con. R. No. 14

MESSRS. LEONARD-LEHMAN-BATCHELDER-MRS. POPE-MESSRS. BETTS-FINAN-TRANTER

CONCURRENT RESOLUTION

To disapprove the proposed Ohio Rules of Evidence.

Be it resolved by the General Assembly of the State of Ohio,

WHEREAS, The Ohio Supreme Court, under the authority granted by Section 5(B) of Article IV of the Ohio Constitution did, on January 12, 1977, promulgate proposed Ohio Rules of Evidence to govern proceedings in the courts of this state; and

WHEREAS, Such proposed rules of evidence create new areas of broad, virtually unreviewable discretion and otherwise effectuate numerous changes in the law of evidence currently recognized in this state which has for years well-served the interests of impartial justice and has evolved from the experience of several centuries; and

WHEREAS, The proposed rules would, in some cases, substantially abridge, enlarge, or modify substantive rights contrary to the specific prohibition of Section 5(B) of Article IV of the Ohio Constitution; and

WHEREAS, The 112th General Assembly constituted the Judici-

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ary Committees of the House and Senate to make a careful and thorough study of each proposed rule and to submit their recommendations accordingly; and

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* Bracketed page numbers refer to pagination of original document—Ed.

WHEREAS, The Judiciary Committees, through the means of select subcommittees which have met jointly and held hearings on the proposed rules, have made a preliminary review of such rules but have not had sufficient time to complete a comprehensive study of the potential impact of the proposed rules upon current practices and procedures in the courts of Ohio and upon the substantive rights of the citizens of this state; and

WHEREAS, The comprehensive nature of the proposed rules necessitates that the General Assembly must, in the interest of justice, devote itself to a careful, deliberative, and thorough study of such rules before allowing them to take effect, which study the General Assembly cannot possibly complete in a responsible manner prior to the July 1, 1977 constitutional deadline, much less prior to the May 1, 1977 deadline for the submission of amendments to the proposed rules; and

WHEREAS, The Congress of the United States has already considered the subject of codification of the law of evidence and determined that such codification is the proper function of the legislative rather than the judicial branch of government, as evidenced by its act of March 30, 1973 (Public Law 93–12, 87 Stat. 1) which deferred the effective date of the Federal Rules of Evidence promulgated by the United States Supreme Court until such time as they were enacted into law by statute; therefore be it

Resolved, That this 112th General Assembly of the State of Ohio, does hereby disapprove of the proposed Ohio Rules of Evidence and any amendments submitted thereto in their entirety; and be it further

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Resolved, That it is the intention of the General Assembly in adopting this Concurrent Resolution of Dispproval [sic] to comply with Section 5(B) of Article IV of the Ohio Constitution, and thus to prevent the proposed Rules from taking effect.

Appendix B

[Page 1]*

(Amended Senate Joint Resolution No. 25)

JOINT RESOLUTION

To establish a joint select committee to study proposals for the adoption of rules of evidence to govern proceedings in the courts of this state.

Be it resolved by the General Assembly of the State of Ohio,

WHEREAS, By the adoption of Amended House Concurrent Resolution No. 14, adopted by the House of Representatives on June 15, 1977 and concurred in by the Senate on June 27, 1977, this 112th General Assembly disapproved of the proposed Ohio Rules of Evidence filed by the Ohio Supreme Court on January 12, 1977 with the Clerk of the Senate and the Legislative Clerk of the House, and thus prevented the proposed Ohio Rules of Evidence from taking effect; and

WHEREAS, The proposed rules were disapproved because they created new areas of broad, virtually unreviewable discretion and made numerous changes in the law of evidence; because they would, in some cases, substantially abridge, enlarge, or modify substantive rights contrary to the specific prohibition of Section 5(B) of Article IV of the Ohio Constitution; and because the General Assembly did not have sufficient time to complete a careful, deliberate, and thorough study of the proposed rules before the expiration of the constitutional time limits after which they would have taken effect; and

WHEREAS, In recent years numerous studies have been made of the rules of evidence and new rules of evidence have been adopted both by the federal government and the governments of several of our sister states; and

WHEREAS, The codification and adoption of rules of evidence to be used in the courts of this state would provide a convenient and authoritative reference for use in trial practice, thus eliminating extensive research among scattered cases and statutes expedit-

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* Bracketed page numbers refer to pagination of original document—Ed.

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ing the trial of cases, and helping to assure the uniform administration of justice throughout the state; and

WHEREAS, Numerous other benefits would accrue to the citizens, business entities, and governmental units of this state by virtue of having ready access to understandable and comprehensive rules of evidence that would be relevant to their daily living, business transactions, and performance of governmental functions; now therefore be it

Resolved, That there is hereby created a joint select committee composed of four members of the Senate appointed by the President Pro Tempore, not more than two of whom shall be of the same political party, and four members of the House of Representatives appointed by the Speaker, not more than two of whom shall be of the same political party; that the President Pro Tempore shall designate from the appointed members a permanent chairman of the joint select committee, and that the Speaker of the House of Representatives shall designate the permanent vice-chairman in the same manner; that the members shall be appointed no later than fifteen days following the adoption of this resolution; and that within fifteen days of their appointment, the joint select committee shall meet at the call of the chairman; and be it further

Resolved, That the joint select committee make a careful, deliberative, and thorough study of the statutory and common law rules of evidence of this state, the proposed Ohio Rules of Evidence submitted by the Ohio Supreme Court, the Federal Rules of Evidence and the evidentiary rules enacted by Congress that supplement or supplant the Federal Rules in certain cases, the rules of evidence adopted in other states, the Uniform Rules of Evidence, the experience of the federal courts and courts of other states in administering justice under such rules, and such other information as may be available on the subject; and be it further

Resolved, That the Legislative Service Commission shall provide staff personnel to serve the joint select committee; and be it further

Resolved, That the joint select committee shall submit a comprehensive final report by December 31, 1978 which shall contain the committee's recommendations with respect to the repeal, amendment, or enactment of statutes relating to the rules of evidence, the effect of the various proposed Ohio Rules of Evidence upon the existing law of this state, the desirability and feasibility of enactment of proposed rules of evidence, and the

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approval or disapproval of rules of evidence promulgated by the Ohio Supreme Court; thereafter the joint select committee shall cease to exist.

. . . .

Adopted September 29, 1977.

Appendix C

[Page 1]*

REPORT OF THE JOINT SUBCOMMITTEE TO THE HOUSE AND SENATE JUDICIARY COMMITTEES ON THE PROPOSED OHIO RULES OF EVIDENCE

The Joint Judiciary Subcommittee, having considered the Proposed Supreme Court Rules of Evidence, reports back to the House and Senate Judiciary Committees a recommendation that the proposed rules not be accepted, based on the following reasons:

1. *The necessity for an exhaustive study of the proposed rules.*

The informative, objective, and comprehensive testimony of representatives of the Supreme Court indicates that competent and experienced counsel have made an extensive study, on behalf of the Supreme Court, first to determine whether adoption of the Federal Rules of Evidence is feasible in Ohio, and second to adapt those rules to the specific needs of the Ohio courts.

The Joint Subcommittee believes an equally exhaustive study should be made on behalf of the General Assembly to assure the citizens of Ohio that the rules adopted represent the best judgment of both the Supreme Court and of the General Assembly. The Constitution of Ohio contemplates that both branches of government concur in the adoption of the rules with a full understanding of their scope and application and of changes resulting in existing Ohio law.

The experience of the Congress of the United States demonstrates the importance of a deliberative study of the Proposed Rules of Evidence. Indeed, after the initial promulgation of the Federal Rules of Evidence by the Supreme Court, committees of Congress devoted considerable time to a review of the Rules before those Rules were enacted into law.

2. *The need to understand each rule and the reasons for adopting it.*

The rules were submitted without explanatory notes, and are stated in broad, general principles. The Joint Subcommittee cannot, solely by examina-

* Bracketed page numbers refer to pagination of original document—Ed.

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tion of the language of the rules, determine the rationale for proposing the adoption of each rule, the changes each rule would make in existing law, whether the rule is from a Federal Rule of Evidence or from Ohio law or other sources, or, most importantly, what the full scope and manner of application of the proposed rule would be in the various trial courts of this state.

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Comments upon the proposed rules, both orally before the Joint Subcommittee and in written communications to the Joint Subcommittee, indicate that lawyers who have studied the rules differ in their interpretation of certain of the rules.

The Joint Subcommittee therefore believes that it cannot, on behalf of the General Assembly, determine the meaning and effect of any proposed rule unless it is informed, by staff notes of representatives of the Supreme Court, of their reasons for adopting each rule, its anticipated effect upon existing Ohio law, the sources of the rule, the experience of courts that are now applying the rule in the trial of cases, and any court decisions interpreting the proposed rule in this or other jurisdictions.

3. *The need to compare the rules with existing Ohio statutes.*

The Joint Subcommittee was not, in the time allotted, able to determine the precise effect of the rules upon existing sections of the Revised Code. This information is needed by every lawyer and court in the state. Sections in conflict with the rules should be expressly repealed rather than repealed by implication. Further, the General Assembly may prefer the rule of evidence established by the Revised Code to a rule proposed by the Supreme Court. A preliminary computer survey reveals that "evidence" appears in 1,192 sections of the Revised Code; "testimony" in 281 sections of the Revised Code; "testify" in 144 sections of the Revised Code; "proof or prove" in 472 sections of the Revised Code; "relevant" in 115 sections of the Revised Code; "admission" in 169 sections of the Revised Code; "witness" in 467 sections of the Revised Code; "privilege" in 383 sections of the Revised Code; and "presumption" in 30 sections of the Revised Code; a possible total of 3253 sections of the Revised Code that could be affected or repealed by the Rules. At the present

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time, the Joint Subcommittee cannot determine the difference between the proposed rules and the existing Ohio statutes. Obviously, not all of

the sections including the above terms contain rules of evidence. Nevertheless, the computer search indicates the scope of the task that must be performed if the General Assembly is to be fully informed of changes in the laws that it has enacted that would be brought about by the Rules.

4. *The General Assembly's concern for substantive rights.*

Lawyers disagree as to whether particular subjects should be classified under rules of evidence, and, even if classed under the rules of evidence, whether the subject matter creates substantive rights or relates solely to procedures for establishing facts in the trial of cases. The Joint Subcommittee believes that under Article IV, Section 5(B) of the Ohio Constitution, any rules of evidence adopted as rules of court should clearly relate solely to practice and procedure, and not to substance.

The Joint Subcommittee further believes that, in accord with principles expressed in *Gregory v. Flowers*, 32 Ohio St. 2d 48 (1972), the Supreme Court and the General Assembly should consider "substance" and "procedure" from a modern and logical view of the appropriate division of constitutional power between the judicial and legislative branches and recognize that "both our courts and the General Assembly have departed from the semantic fog of withering precedent in this area of the law." *Gregory*, supra p. 54.

Such a logical division would recognize that the judicial process of adjudicating facts, administered by a specialized profession, is not in some instances as well suited for establishing and administering social policies as is the legislative process of determining legislative facts by a body that not only is representative of all of the people in the state but also has means

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for obtaining information that could not be brought before a court in the judicial process. For example, in relation to sexual offenses, sections 2907.02, 2907.05, and 2907.11 of the Revised Code, although affecting court procedure in criminal cases, provide a clear example of a legislative solution to a social problem, based upon the determination of legislative facts which could not have been adjudicated in a court. The courts could have no way of officially knowing, or determining, that the law enforcement processes were abusing and demeaning sexual crime victims, violating their rights of personal privacy, and encouraging rapists by discouraging rape victims from reporting offenses.

5. *The limited time within which the Federal Rules have been in effect.*

The Federal Rules of Evidence were enacted by Congress effective January 2, 1975, and, by their express terms, took effect 180 days later on July 1, 1975. Thus, experience under the rules has been comparatively brief. It is too soon to tell how well they are working, or what amendments may still be necessary.

Further, the Federal Rules of Evidence do not contain all of the rules of evidence that are applicable in the federal judicial system. Federal Rule 402 states that "all relevant evidence is admissible, except as otherwise provided . . . , by Act of Congress, . . . " The Joint Subcommittee does not have before it those Acts of Congress now in effect that make relevant evidence inadmissible or otherwise affect evidentiary matters in the federal courts.

In addition, much of the practice of the federal courts is not comparable to the practice of Ohio courts. Federal courts do not handle domestic relations cases, paternity cases, violations of traffic laws, forcible entry and detainer cases, and many other types of cases decided in the state courts. The federal courts are not concerned with regulatory and licensing procedures similar to those Ohio procedures that deny access to the courts to certain unlicensed persons or prohibit proof of ownership of an automobile except by a certificate of title.

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Thus, the Joint Subcommittee is not in a position to compare all of the Ohio evidentiary law with all of the federal evidentiary law; does not have a substantial basis of federal experience to draw upon in determining the impact of a change to federal law; and can only conjecture as to the effect of adoption of rules patterned after the Federal Rules of Evidence in deciding cases of a type that never come before the federal courts.

6. *The need to determine whether the bar is prepared to operate under the rules, beginning on July 1, 1977.*

Some legislators and lawyers have opposed the immediate adoption of the rules, and have asked for further time to study the rules and submit proposed amendments. No organized group of judges or lawyers has expressed strong support for the immediate adoption of the rules, although the Joint Subcommittee recognizes that the absence of comment may not reflect opposition to their adoption.

At this time, the Joint Subcommittee has no means of knowing whether the bar and the courts of Ohio would be prepared to operate

under the proposed rules—particularly in view of the fact that there has been no proposal for the express repeal of existing statutes, nor any indication of what statutes would be considered to be repealed as in conflict with the rules. The testimony before the Joint Subcommittee, and the study of the rules by the members of the Joint Subcommittee, affords no basis for belief that the bar and the courts would be prepared to operate under them. The Joint Subcommittee fears that the majority of the bar would be taken by surprise, and would have a far more difficult time adjusting to the new rules of evidence than was the case in previous adoptions of rules of pleading and procedure.

7. *Need to study the experience of other states.*

A number of other states have recently enacted rules of evidence patterned

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after, but not identical to, the Federal Rules of Evidence. All of these states have changed the rules in various particulars—as part of the legislative process. Further, those states can amend their rules by enacting statutes. A study of the experience of those states, and changes made in the Federal Rules during the legislative process, would be extremely helpful to the Ohio General Assembly which, contrary to the law in other states, will have no power to amend or initiate proposals to amend the proposed Ohio Rules of Evidence after they are adopted.

8. *Need to understand the new philosophy of law embodied in the Federal Rules of Evidence.*

The Federal Rules of Evidence are new, both in language and philosophy. They embody changes that have been advocated for years by leading trial lawyers, judges, and educators. They are not a mere restatement or codification of existing law. Desirable though these changes may be, they will nevertheless require a reeducation of lawyers who have been trained and educated in the use of the present Ohio statutory and common law rules of evidence.

The advocates of the philosophy embodied in the Federal Rules of Evidence have expressed strong opposition to any legislative role in the promulgation of rules of evidence. They believe that courts should be given inherent constitutional power to prescribe procedural and evidentiary rules. Congress did not subscribe to this philosophy, but rather adopted the rules by legislation—although that legislation was inspired by and closely followed the recommendations of the Supreme Court of the United States.

It therefore appears to the Joint Subcommittee that the General Assembly and the Supreme Court should, with utmost harmony and respect for their coequal status, ascertain and agree upon their respective roles in the promulgation and approval of rules of evidence, as opposed to the exercise of purely judicial or legislative power. It is clear that the Ohio Constitution does not

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contemplate that the General Assembly shall have power comparable to that of Congress over the rules of practice and procedure. However, the Ohio constitutional provisions have been borrowed directly from an Act of Congress; and it is not possible at this time to state clearly what, in law, constitutes a matter of practice and procedure and what, in contrast, constitutes a matter of a substantive right.

The Joint Subcommittee believes that any proposed rules should clearly reflect the limits of judicial and legislative powers.

Date: April 20, 1977

/S/ Senator Anthony J. Celebrezze, Jr.	/S/ Representative Paul Leonard
/S/ Senator Michael Schwarzwalder	/S/ Representative Terry Tranter
/S/ Senator Stanley J. Aronoff	/S/ Representative William Batchelder